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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 879.

THE UNITED STATES, APPELLANTS,

vs.

FRANCIS J. LIPPITT.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 4, 1879.

SUPREME COURT OF THE UNITED STATES.

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1 I. .—*Filed February* 1, 1878.—*J. R.*

In the United States Court of Claims.

FRANCIS J. LIPPITT
vs.
THE UNITED STATES. } No. 11903.

To the honorable the justices of the said court:

The petition of Francis G. Lippitt respectfully showeth:

1. On the 19th day of August, A. D. 1861, he received a commission as colonel of the Second California Infantry, a regiment in the service of the United States, and continued in the military service of the United States with the said rank and command until the 11th day of October, 1864, when he was honorably discharged. On the 6th day of March, A. D. 1865, he received the brevet rank of brigadier-general of volunteers.

2. During the year 1861 he was placed in command of the northern military district of California, and was on that duty until July, 1863, when he was commanded by a special order of the department headquarters of the Military Department of the Pacific to report at those headquarters in San Francisco in person, there to await further orders. A copy of the said order is hereto annexed as Exhibit A.

3. The contingency in the said order mentioned having occurred, he, in pursuance of the said order, proceeded to San Francisco on the
2 17th July, 1863; and there reported in person at department headquarters. He continued to reside in San Francisco from that date until the 19th July, 1864, when he was ordered to resume command of his regiment at Fort Miller. During the said period he resided constantly in San Francisco, in obedience to the above order, without troops.

4. During the said period of his residence in San Francisco, he had no home there and lived at a lodging-house, where he paid for board and subsistence.

5. During the said period there were no quarters in San Francisco which the United States could furnish, nor could it furnish fuel in kind.

6. During the said period the commutation value for quarters for a colonel at San Francisco was $ per month, and of fuel was $ per month; and the whole commutation value of the claimant's quarters and fuel during the said period of his residence in San Francisco was $1,628.38.

7. In , 1865, he made application to the War Department for payment of the said sum due to him, as aforesaid, which was refused, and the said claim was, on 13th January, 1878, referred to this court in pursuance of section 1063 of the Revised Statutes.

8. He has never assigned, in part or in whole, his said claim. He is a citizen of the United States. He believes the facts stated hereinbefore to be true, and is justly entitled to the sum of $1,628.38, after allowing all just credits and offsets.

He therefore demands judgment against the United States in the sum of $1,628.38.

JAMES LOWNDES,
Claimant's Attorney.

3 DISTRICT OF COLUMBIA,
City of Washington:

Personally appeared before me, Francis J. Lippitt, the above-named claimant, and made oath that the matters and things in his said petition

stated are true so far they are stated on his own knowledge, and that he believes them to be true so far as they are stated on the information of others.

FRANCIS J. LIPPITT.

Sworn to and subscribed before me, a notary public, this 1st of February, 1878.

[L. S.] D. RITTENHOUSE,
Notary Public.

A.

HEADQUARTERS DEPARTMENT OF THE PACIFIC,
San Francisco, California, July 2, 1863.

SIR: The department commander instructs me to say that if the Second Infantry company, which arrived at Fort Humboldt from Fort Gaston, is still at the first-named fort, it will remain there until further orders. As soon as a sufficient number of companies are raised for the Mountaineer Battalion to garrison the post in the district of Humboldt, abandoned by companies of your regiment, the general desires you to turn over the command of the district to Lieutenant-Colonel Whipple. You will then report in person at these headquarters, where you will await further orders.

Very respectfully, your obedient servant,

RICH'D C. DUNN
Asst. Adjt. General.

Colonel FRANCIS J. LIPPITT,
Second Infantry, C. V., Commanding
District of Humboldt, California.

4 II. *Traverse.—Filed Feb.* 11, 1878.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III. *Plea of limitation.—Filed Feb.* 11, 1878.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants, for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney General.

6 IV. *Amendment to petition.—Filed by leave of court Feb.* 18, 1879.

In the Court of Claims.

FRANCIS J. LIPPITT
vs.
THE UNITED STATES. } No. 11903.

The claimant, by James Lowndes, his attorney, moves for leave to amend his petition by putting his damages at $1,742.

JAMES LOWNDES,
Claimant's Attorney.

Allowed.

7 V. *Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant was colonel of the Second California Volunteers, a regiment in the military service of the United States, from some day preceding the 2d July, 1863, to some day subsequent to the 1st August, 1864.

II. On the 2d July, 1863, the claimant, then being in command of the district of Humboldt, California, where his regiment was stationed, was ordered by the commanding general of the Department of the Pacific to report in person at the headquarters of the department, there to await further orders. The headquarters of the department were at San Francisco during the war. The order referred to is that annexed to and forming part of the petition.

III. In compliance with these orders, the claimant about the 25th July, 1863, left his regiment, and from about that day to the 1st August, 1864, was in San Francisco, absent from his regiment, awaiting orders.

IV. There is no evidence that during the said period the claimant received quarters and fuel in kind. There is no evidence that they could have been furnished in kind. The records of the War Department show that most if not all the officers stationed in San Francisco received commutation of quarters and fuel.

V. The commuted value of quarters and fuel in San Francisco, during the said period, for a colonel of infantry was $1,742.

VI. On the 19th July, 1864, the following order was issued, in pursuance of which the claimant returned to his regiment:

HEADQUARTERS DEPARTMENT OF THE PACIFIC,
San Francisco, Cal., July 19, 1864.

I. Colonel Francis J. Lippitt, Second Infantry, California Volunteers, will repair to Fort Miller and assume command of his regiment; headquarters at Fort Miller.

The Quartermaster's Department will furnish the necessary transportion.

* * * * * * *

By command of Major-General McDowell.

RICHARD C. DUNN,
Assistant Adjutant-General.

VII. It does not appear that the claimant was ordered to or performed any military duty during the time he was awaiting orders; nor

that he reported himself at headquarters, San Francisco, after his first report on his arrival there.

VIII. It does not appear that claimant made any demand on the proper officer at San Francisco that quarters and fuel be furnished him. IX. It does not appear that claimant received any military order after being placed on "awaiting orders," until the order of July 19, 1864, to repair to his regiment.

X. The claimant, in 1865, presented his claim to the proper department, and pressed its settlement from that day to the 9th January, 1878, when it was referred by the War Department to this court, by virtue of the following order:

To the honorable the judges of the Court of Claims:

The undersigned, Secretary for the Department of War of the United States, hereby respectfully represents that a claim has been made against said department by Francis J. Lippett, late colonel Second California Infantry, brevet brigadier-general United States Volunteers, for commutation of fuel and quarters while awaiting further orders at San Francisco, in 1863–'64.

Said claim involving controverted questions of law, and the decision affecting a class of cases, the undersigned hereby, and in accordance with the provisions of section 1063 Revised Statutes of the United States, causes said claim, with all the papers pertaining thereto, to be transmitted to the Court of Claims for trial and adjudication.

GEO. W. McCRARY,
Secretary of War.

WAR DEPARTMENT, *January* 9, 1878.

Filed in the Court of Claims January 10, 1878.

And upon the foregoing findings of fact the Court of Claims decides as

CONCLUSIONS OF LAW.

1. The claim having been presented to the Secretary of War within six years after it first accrued, and having been held by him without action until more than six years elapsed, and he having then transmitted it to this court because it involves controverted questions of law and the decision thereof will affect a class of cases, the statute of limitations cannot be set up by the defendants, and does not bar the consideration of the case upon its merits in this court.

2. Upon the facts found the claimant is entitled to judgment.

VI. *Opinion of the court.*

NOTT, J., delivered the opinion of the court:

By the amended Court of Claims Act, 3d March, 1863 (12 Stat. L., p. 765, §§ 7, 10; Rev. Stat., §§ 1069, 1089, 1093), Congress for the first time attached the element of finality to the judgments of this court, and provided that they should be satisfied at the Treasury, instead of going back, as before, to Congress for approval. At the same time and in the same statute Congress enacted the first statute of limitations applicable to demands against the government, and thereby attached to the claimant's right of action in this court the following condition: "That every claim against the United States cognizable by the Court of Claims shall

be forever barred unless the petition setting forth a statement of the claim be filed in the court [by the claimant] or transmitted to it under the provisions of this act [by either of the houses of Congress] within six years after the claim first accrues" (§ 10).

As the law then stood the court could acquire jurisdiction of a
9 claim in no other way than those alluded to in the statute of limitations; that is to say, only by the voluntary filing of the claimant's petition in this court, or by his presenting it to Congress and its subsequent transmission to the court by the Secretary of the Senate or the Clerk of the House. Act 1863 (§ 2). See also Court of Claims act, 1855 (10 Stat. L., p. 512, § 1).

Five years later, by the act 25th June, 1868 (15 Stat. L., p. 75, § 7), Congress conferred on the Secretaries of the executive departments the power to transmit to this court certain classes of claims "involving disputed facts or controverted questions of law," "with all the vouchers, papers, proofs, and documents pertaining thereto." The claims so transmitted were to be "proceeded in as other cases pending in said court," and to be "subject to the same rules and regulations." The only limitation set upon the discretion of the Secretaries was that no claim of the designated classes should be referred unless the court "by reason of the subject-matter and character" might have entertained jurisdiction of it by the "voluntary action of the claimant."

It has been supposed by the executive departments and by the public generally that the statute of limitations prescribed for cases "cognizable by the Court of Claims" does not impose a restriction upon the executive departments, and that no statute of limitations bars the consideration of claims beyond the limits of this court, except perhaps a statute relating to the refund of taxes (act 6th June, 1872; Rev. Stat., 3228). Since the amended Court of Claims act in 1863, thousands of claims have been submitted to the executive departments and to Congress, and it is safe to say that no statute of limitations has ever been set up against one of them. In the monthly public-debt statement of the Treasury, bonds and coupons which have accrued more than six years are carried as a part of the present debt of the government; ex. gr., of the "old debt," which matured prior to January 1, 1837, there is stated to be due and owing of principal $57,665, and of interest $64,174.81. It is certain that payment of a coupon has never yet been refused because it had accrued more than six years before presentation. Moreover, different Secretaries have transmitted to this court for investigation and determination under the act 25th June, 1868, claims which accrued more than six years before the date of their transmission. In public estimation, and in the settled and uniform construction of the statutes by the heads of the executive departments, it was and is as much the duty of an executive department to examine, audit, adjust, and allow a claim which accrued more than six years before presentation, as a claim that accrued during the current year. Sixteen years of uniform contemporaneous construction by both Congress and the executive departments is certainly entitled to grave consideration.*

A resulting question is whether the comprehensive language of the earlier statute of limitations precludes, in effect, the executive depart-

*In Pugh's case (decided on the same day) the Supreme Court rests its decision entirely upon the uniform construction given to a doubtful statute by the Executive Departments and the Court of Claims; and in Mrs. Alexander's case (7 C. Cls. R., 205; 12 Wallace R., 177), where the Pension Bureau had given a certain construction to a statute for a long period of time, and Congress apparently had acquiesced in it, that the construction which should be given by the court was not an open question as if the matter were res novo.

ments from availing themselves, in such cases, of the power given to them by the later act, 1868—whether when a department has delayed the payment of claim until more than six years have elapsed from the time it first accrued, the Secretary may order payment, but may not secure a judicial investigation of it in this court?

10 The cases contemplated by the earlier statute are cases where a right of action is conferred upon the parties coupled with a limitation that they shall avail themselves of it within a reasonable time; where the action is voluntary upon their part, the delay exclusively attributable to their own neglect, and the bar directly the result of their own laches. The cases coming up from the executive departments are few; they involve the direct personal discretion of the Secretary; they occur only where he is in doubt as to what his official action should be; they come entirely at his will and often against the protest of the party; and, when the disputed fact or controverted question is judicially determined, they primarily go back to the department whence they came, to be satisfied out of appropriations made for it. The case is in effect as if a Secretary merely sent up an issue of law or of fact to be tried here.

In a word, the two statutes were enacted for entirely different purposes. The one conferred on the claimant a right of action against the government; the other conferred on the executive departments a judicial means of investigation against claimants. Under the former, the court acquires jurisdiction only by the filing of the claimant's petition either directly by himself or indirectly by one of the houses of Congress. Under the latter, it acquires jurisdiction exclusively by the transmission of the claim by a Secretary, the subsequent petition of the party performing merely the office of a pleading.

This case probably turns upon the latter proposition. If, after a claim has been presented to the proper department in due time, and after it has been examined and allowed by an auditor and approved and certified by a comptroller of the Treasury, a Secretary, against the protest of the party, can transmit it to the court, and the court by his action acquire jurisdiction, it seems impossible to ascribe to the legislative intent the inequitable purpose of barring the claim by reason of a lapse of time for which the department and not the party was responsible. Cyrus C. Clark's case (96 U. S. R., 37).

This proposition concerning the power of a Secretary to transmit a claim to this court for judicial determination has been in several instances and in various forms before the court, and there have been few questions more exhaustively discussed or carefully considered. In one of the earlier of these cases (Bright's case, 6 C. Cls. R., 118), two adverse parties claimed the rent of the same premises. The Secretary of War, being unable to determine which was the owner of the premises and entitled to receive the rent accrued, transmitted their conflicting claims to this court for determination under the statute. One of the contending parties refused to appear and prosecute his claim in this court. Without his appearance no final determination of the controversy could be reached, and the recovery of a judgment by the rival party would have left the demand of the other open, and the defendants liable over to him. It was, therefore, apparent that if jurisdiction could only be acquired by his voluntary appearance, the purpose of the statute would be defeated and the prudent action of the Secretary be utterly unavailing. A very serious question consequently was presented, and after mature deliberation it was held that the court acquired jurisdiction of the claim by the transmission of the Secretary.

The last of these cases sets forth an exhaustive statement of the ma-

tured views of the majority of the court on the construction of the two statutes, and we append so much of it as is applicable as our opinion in this case:

Upon the merits, the court entertains no doubt of the claimant's right to recover. He was not ordered to his home to await orders, as
11 was the officer in Phisterer's Case (12 C. Cls. R., 98; 94 U. S. R., 219), nor to the city of San Francisco; but to the headquarters of the military department. If the headquarters had been moved, he would have been bound to go with them; if he was kept at a military station constantly awaiting orders, he was to that extent assigned to duty there, and the responsibility for his non-employment rested with his superior officer.

The judgment of the court is that the claimant recover of the defendants the sum of $1,742.

Per DRAKE, Ch. J., in the Winnisimmet Company's Case (12 C. Cls. R., 319):

In the year 1865 the claimant presented to the Department of War a claim against that department for compensation for the services of the steamer Winnisimmet, under a charter-party entered into between the claimant and an officer of the Quartermaster's Department on the 17th of December, 1862. The period of time covered by the service was from April 14, 1863, to August 2, 1863.

The Third Auditor reported in favor of the payment of $5,854.58 to the claimant, and the Second Comptroller concurred in and approved the report of the Auditor, and on the 14th of November, 1876, the Second Comptroller admitted and certified that sum to be due the claimant.

Thereafter, on the 28th of November, 1876, the Secretary of War, under the authority of section 1063 of the Revised Statutes, transmitted the claim to this court, to be here proceeded in according to law.

The claimant urges that a valid objection appears on the face of the papers transmitted, in the fact that the claim accrued in the year 1863, and is barred by the tenth section of the act of March 3, 1863 (12 Stat. L., 765), which declared "that every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrues."

As this provision was in force when this claim accrued, it would present a complete bar to an action voluntarily brought thereon in this court after the lapse of six years from August 2, 1863. But as the claimant has not brought an action, but is sent here against his will, the question does not arise in that form. Had a petition been filed in the ordinary way, it would be for the defendants to insist on the statutory bar; but here the case is reversed, and we have the claimant seeking to escape the jurisdiction of the court by urging that the Secretary of War had no legal right to transmit the claim here, because in this forum it was already barred by the terms of that act. This presents a question not before raised, and which requires careful consideration.

When the act of March 3, 1863, was passed there were but two prescribed ways for bringing claims into this court: First, by the voluntary act of the claimant in filing a petition here; and, secondly, by the reference of a claim to the court by one or the other house of Congress (10 Stat. L., 612). In regard to the latter, the second section of that act provided "that all petitions and bills, praying or providing for the satisfaction of private claims against the government, founded upon any

law of Congress, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid."

12 When, therefore, this same act, in the tenth section, above cited, declared that every claim should be barred "unless the petition * * * be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrues," it referred to a transmittal under the authority of the second section, and restricted the power to claims which had first accrued within six years previous to the transmittal.

Such was the state of the law when, by the seventh section of the act of June 25, 1868 (15 Stat. L., 75), the power was given to the head of a department to transmit claims to this court. The following are the terms in which that power was conferred:

"That it shall and may be lawful for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant. * * * Provided, however, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject matter and character, the said Court of Claims might, under existing laws, take jurisdiction on such voluntary action of the claimant."

It cannot fail to arrest attention that while the subject-matter and character of the claims which may be transmitted to this court under this section, and the circumstances authorizing their transmittal, are defined and prescribed, there is nothing there fixing a time within which they shall be transmitted, either with reference to the date of the accruing of the claim or to that of its presentation to the department. The only reference to time is in the words "whenever any claim is made upon said department"; which would seem to import that a claim might be sent at any time during its pendency before the department as an unsatisfied demand, no matter when it accrued.

This view is strengthened by what would seem to be a quasi legislative interpretation of this section, to be found in the Revised Statutes, where all the provisions of the previous acts relating to the jurisdiction and proceedings of this court are collated and arranged together.

Let it be remembered that both the provision authorizing the Secretary of the Senate and the Clerk of the House to transmit petitions here, and also that establishing a bar by limitation, are in the above-cited act of 1863. When, therefore, the latter provision declared that "every claim shall be forever barred, unless the petition * * * be filed in the court, or transmitted to it under the provision of this act, within six years after the claim first accrues," it could have no possible reference

to transmittal by a head of a department, for no such authority was conferred upon any such head until more than five years thereafter.

When, therefore, in revising the statutes in 1873, all the provisions applicable to this court were arranged together, and we find in the same chapter, first, the provision authorizing the Secretary of the Senate and the Clerk of the House to transmit claims; and secondly, that authorizing the head of a department to transmit claims; and thirdly,
13 the provision in regard to limitation; if the last were embodied there in its original terms, as found in the act of 1863, it might very plausibly, if not conclusively, be urged that the words "transmitted to it under the provisions of this act" include every transmittal provided for in that chapter, whether by a house of Congress or by a head of a department. But, as if to exclude such a conclusion, the language is changed in the revision so as to read, "Every claim * * * shall be forever barred unless the petition * * * is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues;" thus confining the operation of the provision, so far as transmitted claims are concerned, to those transmitted by one or the other house of Congress, and wholly omitting any reference to those transmitted by heads of departments. Though this may not be entitled to be regarded as a conclusive legislative interpretation of the former statutes, it may at least be considered as indicating an intent to retain in the revision the pre-existing condition of the law.

But there are other considerations tending toward the same conclusion, which are worthy of mention.

The section in question authorizes the head of a department to transmit a claim hither, "where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases." How could such a decision be made here if all consideration of the questions involved in the claim could be stopped in limine by a plea of limitation? It certainly could not have been the intention of Congress to plant such a barrier in the way of obtaining a decision, which itself intended to have the dignity and force of "a precedent for the future action of an executive department."

Again, a claim may be transmitted here by a head of a department, "where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States." The legislature rightly deemed that the decision of grave questions of constitutional law was not within the sphere of an executive department, but legitimately belonged to the judiciary; and so provided a way in which the former should transfer such questions to the latter, where ultimately, on appeal, the judgment of the court of last resort could be pronounced as a final and conclusive construction of the Constitution. If this could be prevented by the interposition of the bar of limitation, then this mode of obtaining a judicial decision of matters of the highest import, which can be no otherwise fitly decided, may be made wholly nugatory.

Again, to hold that a claim transmitted by a head of a department may be met here by the bar of limitation is to put it in the power of that officer to defeat the claim finally and hopelessly, before both the executive and the judicial departments of the government, by the simple and convenient process of removing it from the former to the latter, for the very purpose of securing its defeat here by limitation. In point of fact that was done in this case. Among the papers sent hither by the Secretary of War is a report upon this claim made to him by a judge-

advocate, which concludes with these words: "It is therefore advised that the case be sent to the Court of Claims, where the Attorney-General can interpose the statute of limitation to these renewed or continued demands." This report was approved by the Secretary of War; and so the very case is presented of a head of a department sending a claim here, not for our decision upon its merits, but for the express purpose of having us debar the claimant by limitation from any such decis-
14 ion. We do not believe that it was the intention of the legislature thus to defeat claims sent here by a head of a department.

Again, it is well known that with the utmost diligence which a claimant may exercise, it is often more than six years before final departmental action can be obtained upon his claim. In this case the claim was pending in the department from January, 1865, till November, 1876, nearly twelve years. It is not in the power of a claimant to avoid these delays, however he may urge action on his claim; he must wait for action until the proper officers reach their conclusions. Presumably they act as soon as circumstances permit. But it is possible, though we would not say probable, that, while leading the claimant to suppose they were moving as rapidly as practicable, they might delay action with the intent of keeping him in the department until the bar of limitation would be effectual here, and then send him here for the express purpose of having his claim defeated by that bar. It is not to be supposed that the legislature intended to authorize such a mode of defeating claims which, when judicially examined, might be found just and well sustained by competent evidence.

Again, if, when the head of a department transmits a claim to us, the Attorney-General may throw it out of court by setting up the statutory bar, the extraordinary spectacle is presented of a conflict between two executive departments, one endeavoring to thwart the other in the exercise of an authority expressly conferred by law. It is not admissible to infer a right in any department to institute such a conflict. On the contrary, the whole theory of our executive system infers the exact opposite. If such right is claimed, it should be clearly shown; which has not been done in this case. The very fact of the existence of this court, with power to decide between the government and citizen claimants, excludes the idea of a jurisdiction acquired by us through the act of one department being wrenched away by the action of another.

Again, and finally, as was held in the Delaware River Steamboat Company's Case, above cited, this power was given to the heads of departments mainly in the interest and for the protection of the United States. A long pending dispute had existed between some of those heads and the accounting-officers of the Treasury, as to their respective powers over claims and accounts. The question was submitted successively to Attorneys-General Wirt, Berrien, Taney, Butler, Crittenden, Johnson, Cushing, Bates, and Stanbery, by all of whom it was held that the auditing and controlling of accounts were subject to the superior supervision of some appropriate head of a department. In the opinion of Mr. Stanbery, delivered in 1866, the previous ones are referred to (12 Opinions of Attys. Gen. 43.) In view of those opinions, and to settle the dispute by legislation, the act of March 30, 1868 (15 Stat. L., 54) was passed, declaring that the act of March 3, 1817 (3 Stat L., 366), "shall not be so construed as to authorize the heads of departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury, but that such balances, when stated by the Auditor and properly certified by the Comptroller, as provided by that act, shall be taken as final and conclu-

sive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts: Provided, That the head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided." This act is substantially embodied in section 191 of the Revised Statutes.

It will be observed that after its passage, though it provided that the decision of the Comptroller might be reviewed by the proper courts, there was no way prescribed for the head of a department, however firm his conviction that a claim ought not to be paid, to bring it under such review. To meet this difficulty, as we suppose, the same Congress, in the seventh section of the act of June 25, 1868, authorized the heads of departments to transmit certain descriptions of claims here. As under no circumstances could there ever arise before the Comptroller a question of limitation, and as his decision would necessarily be upon the merits of the claim, it is clear to us that the judicial review which the head of the department was authorized to invoke by transmitting the case here was designed to be a review of the claim upon its merits, in fact and in law, and that it was not intended that that kind of review should be precluded by a statute of limitation not in its terms applicable to that particular case, and the effect of which in many cases would be to frustrate, by a new issue, the effort of the superior officer to protect the government from a claim which he believed to be unjust.

In no view does it appear to us that a claim transmitted to this court by the head of a department can be defeated by limitation.

VII.—*Dissenting opinion.*

DAVIS, J., dissenting:

Being constrained to dissent from the judgment rendered by the court, I will briefly state why I cannot concur in it.

I. I hold that the barring clause of the act of March 3, 1863, bars every claim of the several classes cognizable by this court, unless within six years after the claim first accrues it is put in suit after the manner provided by law.

By the act of March 3, 1863, reorganizing the Court of Claims, Congress marked out a new policy for the government. It authorized this court to settle, judicially, disputed claims which might be brought before us through proper channels, and it fixed a limit of time after which all claims cognizable here and not in suit should be barred.

In a recent case * we had occasion to consider the character of this bar. Speaking through the Chief Justice, we all said—

"There is a great difference between the terms of this act and those of any other statute of limitations that we have found. We are not aware of any such statute that declares a demand barred if not sued on within the prescribed time; but the prescription always applies solely to the right of action thereon. The plea of the statute in a suit between individuals is a personal privilege, of which the defendant may or may not avail himself, as he pleases. If he does not interpose it he is deemed to waive it, and no court will set it up for him, no matter how plainly it appears on the face of the declaration or petition that the action is barred. * * * But the parties to a suit in this court have a very different relation to each other from that of individuals in other

* Kendall's case.

courts. * * When, therefore, the law declares that 'a claim shall be forever barred unless the petition setting forth a statement of the claim be filed in the court within six years after the claim first accrues,' it is in effect a standing and ever-present plea of limitation, which the court is bound to take cognizance of in every case."

In deciding the motion in that case, it was not pertinent to inquire why Congress adopted such unusual language in fixing the bar against government claims. My associates take views of the present case which render it necessary for me now to do so, in order to explain why I am constrained to differ from them.

Before the passage of the act of March, 1863, executive officers were in the habit of passing upon claims against the government without regard to their date or age, and claimants were accustomed to appeal to Congress from the decisions of the departments. It is not difficult to imagine that such a system might in time become mischievous and perilous.

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At the time of the passage of that act the country was engaged in a gigantic war, which increased expenses twenty-fold, and taxed the resources of the Treasury, not only to pay, but even to audit the many claims which the Army and Navy threw upon it. Under these circumstances the legislature determined to convert this court, which before then had been little more than a Congressional commission, into a veritable judicial tribunal. We may assume that it did this with the object of affording a speedy remedy to claimants, as well as to relieve itself and the Treasury. It incorporated in the act which was to effectuate its new policy the sound principle recognized in all systems of civilized law, and known by the name of "prescription" in the systems derived from Rome, and when applied to personal property, by the name of "limitation" in the systems derived from the common law of England.

So far as this court is concerned the prescription was most effectual. We held in Kendall's case, as already stated, that we cannot permit the agents of the government to waive it here, even if they should wish to do so. Although we sit with open doors, and are armed with the power to compel the attendance of witnesses and to force them to speak under oath, and although our proceedings are conducted in the presence of scrutinizing attorneys and counsel, representing both sides, and are, as a rule, reviewable in the higest court, the law of 1863 does not intrust us with power to examine into the merits of a claim which is brought here more than six years after it first accrues.

In my opinion the same rule of policy applies with greater force to officers of executive departments, whose daily business is not watched by the same critical eye, and who have no power to compel the attendance of witnesses, and can even in the Treasury apply the test of an oath only to the statements of witnesses who voluntarily appear, but without subjecting them to cross-examination by hostile counsel. Only language of the plainest and most unmistakable character can convince me that Congress reposes in executive officers the discretion to pay claims of the classes cognizable by this court after it orders them to be barred here.

When I turn to the act of 1863, I find not only that no intent to repose such power in an executive department appears there, but that, on the contrary, a purpose to take that power away is expressed in perspicuous terms. I find the statutory bar raised against every claim cognizable by the Court of Claims; not solely against such claims as may be brought here for the court to take cognizance of. It reaches, as we pointed out in Kendall's case, the claims as well as the remedy, whether

they are brought here or are presented at the departments. Congress must have used this sweeping language designedly, in order to prohibit accounting officers from allowing and paying claims which we are prohibited from considering.

Thus the act of 1863 placed the government before the law in the position which the private citizen had long occupied, and reserved to the legislature as the political representative of the nation the right which the individual citizen can always exercise, of waiving the bar to the statute of limitations.

The argument that executive officers have frequently disregarded this statute has little weight with me. If its language were doubtful, executive construction would be entitled to consideration. Under the
17 circumstances it simply amounts to this: that executive officers have been reluctant to surrender the power which they enjoyed before 1863. Instead of finding in the past disregard of the statute a reason why it should be set aside in the future, it strikes me as better law and sounder policy to bring its excellent provisions to the notice of those who are violating them (doubtless unintentionally), in order that they may observe them in future.

Equally unimportant is the consideration that the departments or the public creditors may be put to inconvenience by the enforcement of this act. If it bears harshly on any branch of public business or any class of public creditors, Congress will doubtless furnish a speedy remedy. It is better to await legislative relief rather than sacrifice a valuable safeguard to the Treasury by judicial construction.

A claimant who finds himself subjected to a delay in an executive department, which threatens to carry his claim unadjusted beyond the time fixed for barring it, has always his remedy open in this court. By commencing suit here within the proper time, he may always arrest the bar, and thus procure through the machinery of the court the settlement after the lapse of six years which is denied him through departmental machinery. Judge Loring, in his dissenting opinion in the Winnisimmet Company's case, presents this view with perspicuity. He says:

"I think that the statute of 1868, by its words cited, submits the case sent here by the head of a department to the same pleadings and evidence, defenses and judgments, to which they would have been subject if brought here originally by the claimants, or transmitted here by either house of Congress, and that all such cases thus within our jurisdiction are equally within it for all purposes, and are to be administered here in the same way. And I think this construction works injustice to none, but even-handed justice to all. * * And I do not see that the construction I have contended for subjects a claimant to any hardship at the department. He has always at first his election to carry his claim there, or to bring it here, and he can remove it from there and bring it here at any time at his pleasure.[a]"

In the next place this is the only construction of which the language is capable, when tested by the rules of construction established by the Supreme Court.

In deciding that a statute invalidating an assignment of claims against the United States, made before their allowance and before the issue of a warrant for their payment, rendered all such assignments void, notwithstanding the decisions of this court and the practice of the Treasury to the contrary, the Supreme Court said in a late case:

"We discover nothing in reason, nothing in the mischief the act was

[a] Winnisimmet Company's case, 12 Court Cl. Rep., 329.

plainly intended to remedy, and nothing in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made; nothing that can justify our holding that, when Congress said all transfers or assignment, partial or entire, absolute or conditional of claims against the United States, shall be null and void, they meant they should be in operation only when presented to the accounting officers of the Treasury, but effective when presented everywhere else."*

In my judgment, a similar process of vigorous and common sense reasoning leads to a similar result in the present case. To my mind it is as difficult here as it was there to find anything in reason, anything in the mischief the act was plainly intended to remedy, anything in the language employed tending to warrant the admission of any exceptions from the comprehensive provisions made; and there is no more in this case than there was in that to justify a court in holding that Congress did not intend that the statutes should be in operation both in this court and in the departments. To complete the parallel, the result,
18 which seems to me to be right, reverses a practice in the Treasury which is said to be uniform, and a decision of this court on a point in which the dissenting judge and the majority concurred. †

And, lastly, this construction is in harmony with the views of public policy entertained by the political departments of the government. In the circular to accounting officers and others, which is quoted by Judge Richardson in his dissenting opinion in McKee's case, the present distinguished head of the Treasury says:

"The Treasury Department is admirably organized to pass upon accruing demands upon the government, and upon the accounts of disbursing officers. All its machinery and checks are adapted to this duty, and no serious complaint has been, or is likely to be, made of the proper discharge of their duty. But when claims long passed due are presented upon ex parte evidence to officers who have no means of calling witnesses, no powers to cross-examine them, no modes of testing the sufficiency of testimony or its credibility, none of the safe-guards of an open court of justice, the passage of fraudulent claims is unavoidable. Congress has by law provided a court of claims, where within a limited period, all demands founded upon contracts may be presented and openly tried and decided. If this remedy in any case should be insufficient, claimants can appeal to Congress, which may grant either a new trial in the courts, or a re examination in the departments, or directly furnish such relief as it deems right and proper. The Treasury Department is not a court of claims, and the reason for withholding the ordinary powers of such a court became apparent to Congress by actual errors that had occurred.‡"

II. The bar created by the act of March 3, 1863, is not repealed or affected by the act of June 25, 1868, nor by any other act.

The act of 1863, provided but two modes by which this court could gain jurisdiction over a claim against the government. A third mode was created by the seventh section of the act of June 25, 1868. This authorized the head of a department, in certain specified cases, to transmit claims hither for adjudication.

The act of 1868 did not in terms repeal the bar contained in the act of 1863, nor did it in terms enlarge the powers of this court as to the

* Gillis' case, 95 U. S. R., 414.
† Winnisimmet case, dissenting opinion, 12 C. C. R., 330.
‡ 12 Ct. Cl. Rep., 557.

claims of which it might take cognizance. So far as the statute expressed the will of the legislature in words, it contained nothing to warrant the head of a department in transmitting here a claim which he could not himself lawfully pay, or to authorize this court to render judgment against the government upon such a claim.

The reasons which induced Congress to enact this provision in the act of 1868 are stated with the usual clearness of the writer in the opinion of the court in the Winnisimmet Company's case.

"A long pending dispute had existed between some of those heads and the accounting officers of the Treasury as to their respective powers over claims and accounts. The question was submitted successively to Attorneys General Wirt, Berrien, Taney, Butler, Crittenden, Johnson, Cushing, Bates, and Stanbery, by all of whom it was held that the auditing and controlling of accounts were subject to the superior supervision of some appropriate head of a department. * * * In view of these opinions, and to settle the dispute by legislation, the act of March 30, 1868, was passed, declaring that the act of March 3, 1817, 'shall not be so construed as to authorize the heads of departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury; but that such balances, when stated by the Auditor and properly certified by the Comptroller, as provided by that act, shall be taken as final and conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts.' * * * It will be observed that after its passage, though it provided that the decision of the Comptroller might be reviewed by the proper courts, there was no way prescribed for the head of a department, however firm his conviction that a claim ought not to be paid, to bring it under such review. To meet this difficulty, as we suppose, the same Congress, in the seventh section of the act of June 25, 1868, authorized the heads of departments to transmit certain descriptions of claims here."

This is undoubtedly the true and the only motive which induced
19 Congress to enact this provision in the act of 1868. To accomplish this simple purpose it was not necessary to disturb the bar which had been erected in 1863, and in my judgment it was not disturbed.

Had there been no previous or other legislation, the head of a department, being authorized to transmit claims here "whenever" one should be presented involving disputed facts or controverted law, would have been empowered to transmit any claim of that character, without reference to its age. But under the circumstances this power was to be exercised with reference to the restraints imposed by the previous legislation of 1863; especially as the act of 1868 itself required that he should only transmit claims belonging to one of the several classes of cases of which, by reason of their subject matter or character, we could take cognizance under existing laws, on the voluntary act of the claimant.

Being of the opinion that the head of a department can transmit here for our adjudication only claims which he is authorized to pay when there are no disputed facts or controverted law, and that we are authorized to render judgment against the government on a claim so transmitted only when we might have given judgment against it had the claim been brought here by the voluntary act of the claimant, I regard the claimant's demand as barred by the statute of limitations, and I think the petition should be dismissed.

20 VIII.—*Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 3d day of March, A. D. 1879, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Francis J. Lippitt, claimant, do have and recover of and from the United States the sum of one thousand seven hundred and forty-two dollars ($1,742.00).

21 IX.—*Application for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause on March 3d, 1879, in favor of claimant, the defendants, by their Attorney-General, on the 5th day of March, 1879, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney General.

Filed March 5, 1879.

And now, to wit, March 5, 1879, it is ordered that the appeal be allowed as prayed for.

22 In the Court of Claims.

FRANCIS J. LIPPITT
vs.
THE UNITED STATES. } No. 11903.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the dissenting opinion, of the final judgment of the court, of the application of the defendants for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixteenth day of September, 1879.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

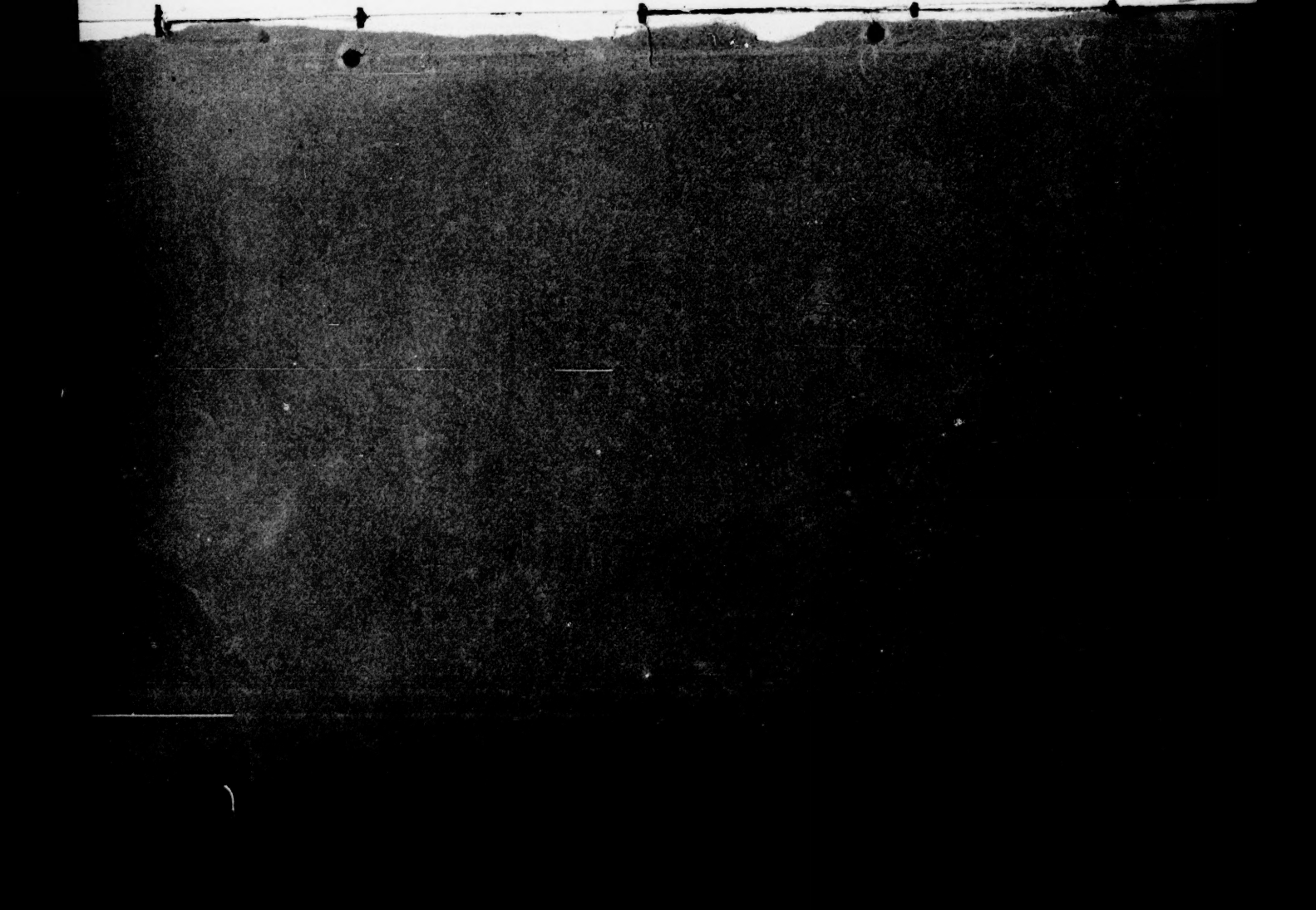
(Indorsement on cover:) No. 879. The United States, appellants, vs. Francis J. Lippitt. Court of Claims. Filed 4th October, 1879.

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,
vs.
FRANCIS J. LIPPITT. } No. 879.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,
vs.
FRANCIS J. LIPPITT. } No. 879.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Between July 2, 1863, and August 1, 1864, the petitioner was colonel of the Second California Volunteers, in the service of the United States.

On the 2d day of July, 1863, he was in command of the district of Humboldt, California, and on that day he was ordered by the commanding general of the Department of the Pacific to report, in person, at the headquarters of the department at San Francisco, and await further orders.

About the 25th July the petitioner left his post, and from about that day to the 1st of August, 1864, was in San Francisco awaiting orders. He was not furnished

fuel and quarters during this time. There is no direct evidence whether they could or could not have been furnished; most of the officers *stationed* at San Francisco during this time received commutation.

Petitioner was not ordered to perform, nor did he perform, any military duty during this time, nor did he again report himself at headquarters after his first report on his arrival. He made no demand on the proper officer that fuel and quarters be furnished him, nor did he receive any military order after his arrival until July 19, 1864, when he was ordered to repair to his regiment.

In 1865 petitioner presented to the War Department a claim for commutation of fuel and quarters while so awaiting orders, which, with the papers, were, on the 9th day of January, 1878, referred by the Secretary of War to the Court of Claims, in pursuance of section 1063 of the Revised Statutes.

Subsequently, and on the 1st day of February, 1878, the petitioner filed his petition in the Court of Claims to recover said commutation; to which, among other things, a plea was interposed under the statute in such case provided, that the action was barred in that the petition was not filed within six years after the claim first accrued. On the trial, judgment was rendered in favor of the claimant.

The following are extracts from the Army Regulations from 1821 to the present time, and are believed to be all that are material to the question at issue, and are the same that were used in the argument of the Phisterer case in this court, and referred to in the opinion of the court. (94 U. S., 219.)

EXTRACTS FROM ARMY REGULATIONS WITH REFERENCE TO FUEL AND QUARTERS.

Printed Army Regulations of 1821 prescribe the fuel allowance to officers (p. 1882.)

Par. 57.—On the arrival of an officer at a *post* he shall make *written* requisition for quarters, &c.

190. Par. 61.—Officers are entitled to quarters at their *permanent* stations, and *temporary* absence [less than one month] *on duty* is not to be construed to deprive them of this allowance.

Regulations of 1835.

When an officer arrives at a post, if he be entitled to fuel and quarters, he shall make requisition, &c., accompanied by a copy of the order placing him on duty.—(Page 145, par. 42.)

At stations where officers *serve* without troops and where there are no public quarters, the Quartermaster-General is *authorized* to cause quarters to be hired for them, *or, if it be found more convenient*, to allow them a reasonable compensation.—(148, par. 53.)

(This seems to be the first instance of allowance of commutation.)

Non-commissioned officers attached to general or department headquarters, &c., where public quarters cannot be furnished, may be allowed, *according to circumstances*, a reasonable commutation in lieu thereof, *to be approved by the Secretary of War.*—(148, par. 54.)

When a commutation is made for quarters a commutation will also be allowed for fuel, to be paid by the authority of the Quartermaster-General, not to exceed the average market price.—(148, par. 55.)

Officers are entitled to quarters at their *permanent stations*, * * * and temporary absence *on duty* shall not be construed to deprive them of this allowance, except when on court-martial or other temporary duty, for which they are allowed a per diem, &c.—(148, par. 59.)

Regulations of 1841.

He (the Quartermaster-General) will cause the officers of his Department to *serve* both at *stations* and in the field.

Officers assigned to *stations* will not be removed from them unless required for duty in the field, except by his order or that of the Secretary of War. *At their stations* they may be required to sit as members of court-martial and of military boards.—(181, par. 935.)

He shall *visit the stations* of the several officers of his Department, for the purposes of inspection and supervision.—(181, par. 936.)

Similar provisions as to requisitions of officers for quarters and fuel as before.—(187, par. 965.)

Also as to commutation.—(190, par. 976.)

Officers are entitled to quarters at their *permanent stations.* Temporary absence *on duty* shall not, &c.—(190, par. 982.)

Regulations of 1847.

Officers on leave will report monthly to the Adjutant-General, &c.—(44, par. 231.)

If a post or *station* should prove unhealthy, the troops may be removed, &c.—(11, par. 57.)

Whenever a military post or *station* shall be abandoned, the property should be turned over, &c.—(11, par. 58.)

Commanding officers of forts and *stations* on the sea-coast to aid in quarantine regulations.—(11, par. 61.)

The military force, at any post or *station* in the Indian Territory, shall be employed, &c.—(17, par. 91.)

Whenever an officer is ordered from one station to another, or for the performance of any duty not being with troops, he shall *proceed by the most direct route* without *unnecessary delay*, nor is he, under any pretense whatever, except that of sudden illness, to apply for leave of absence from the time he quits the station at which he receives the order until he has arrived at his place of destination.—(45, par. 227.)

Whenever such officer shall appear to have made unusual or unnecessary delay, he shall immediately report the cause to the commanding officer of the post.—(45, par. 228.)

Officers on leave to make monthly reports as above.—(45, par. 231.)

Regulations of 1857.

Officers on leave will report monthly, as above.—(23, par. 171.)

Whenever an officer traveling under orders arrives at his *post*, he will report to the commanding officer the time occupied, &c.—(23, par. 168.)

The provision for commutation of fuel and quarters is in precisely the same language of par. 1080 of Revised Regulations of 1863.—(125, par. 974.)

Temporary absence *on duty* will not deprive him *at his station*.—(125, par. 975.)

Officers and troops in the field are not entitled to such commutation.—(125, par 976.)

An officer arriving at a *station* must make requisition on the quartermaster for his quarters and fuel, accompanied by a copy of the order putting him on duty *at the station*.—(126, par. 977.)

Form of voucher for commutation of fuel and quarters as prescribed by the Regulations of 1857.

THE UNITED STATES to ——— ———, DR.

(Date.)—To commutation of quarters from —— to ——.
For rooms, at —— dollars each per month.
For commutation of fuel for same period, ——.

I certify on honor that there were no quarters owned or hired by the public at the above station which could be assigned to ——— during the above period, and that the fuel is charged at the average market-price for the month.

A. B.,
Quartermaster.

I certify on honor that the above account is correct and just; that I have been regularly stationed on duty at ——— by ——— during the period charged for; that I have not been furnished with quarters, rent, or fuel by the public, nor received a commutation of money in lieu thereof.

C. D.

Received of ——— ———, in full of above account.

C. D.

NOTE.—This certificate must show by whose order the officer was stationed, and the first account must be accompanied by a copy of the order.—(See page 158.)

Regulations of 1861.

Wherever an officer traveling under orders arrives at his post, he will submit to the commanding officer a report in writing of the time occupied in the travel, with a copy of the orders under which the journey was performed, &c.—(31, par. 173.)

When an officer is prevented by sickness from joining his station he will transmit certificates, &c.—(33, par. 188.)

When public quarters cannot be furnished to officers at stations without troops, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market price delivered.—(161, par. 1080.)

An officer is not deprived of his quarters and fuel, or commutation, at his station, by temporary absence on duty.—(162, par. 1082.)

An officer arriving at a station shall make requisition on the quartermaster for his quarters and fuel, accompanied by a copy of the order putting him on duty at the station.—(162, par. 1086.)

Form of voucher for commutation of fuel and quarters, same as in Regulations of 1857, above mentioned.—(Page 194.)

Revised Regulations of 1863.

These are precisely the same as of 1861, so far as above quoted and referred to, and the paragraphs numbered the same.

ARTICLE XLII (42), Revised Regulations of 1863, provides as follows:

PAR. 1067. When barracks and quarters are to be occupied they will be allotted by the quartermaster at the station, under the control of the commanding officer.

The number of rooms and the amount of fuel for officers are as follows:

* * * * * * *

A brigadier general or colonel, four rooms as quarters and one room as kitchen; and one cord of wood per month, from May 1, to September 30, and 4 cords per month from October 1 to April 30.

* * * * * * *

ASSIGNMENT OF ERRORS.

The United States assign for error—

1. That the court erred in giving judgment for the petitioner, notwithstanding the said plea that the action was barred by statute.

2. That the court erred in deciding that the petitioner was entitled to commutation of fuel and quarters while awaiting orders.

BRIEF.

First. The action is barred by section 1069 of the Revised Statutes, which is as follows:

"*Every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues:* Provided, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

This was originally enacted as part of the organic act of March 3, 1863 (section 10, 12, Stat. 765), by which the court with its present powers was established, and was not, so far as respects the issue herein, materially changed in the revision.

Prior to June 25, 1868, there were but two ways provided by law of getting a claim before this court, namely, by voluntary petition of the claimant, and by reference by either house of Congress, and there is no dispute that, as enacted in 1863, the bar was applicable to every claim cognizable by the court (with specified exceptions not here material) which should be so voluntarily brought

before it under its general jurisdiction (§ 1 act February 24, 1855, 10 Stat., 612), or so referred thereto (*Ib.*, and § 2 act March 3, 1863, *supra*); nor is it disputed that in all such cases it has continued to be and is applicable, so that, if the petition herein had been filed without intervention of the Secretary of War under the act of June 25, 1868, the claim would be barred.

The said act of 1868 (15 Stat., 76) added a third way of bringing a claim before the court by authorizing the head of an executive department to send it there (if within a specified description) for adjudication. As substantially re-enacted in the Revised Statutes, it is as follows, the part especially involved herein being italicized:

"SECTION 1063. *Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law*, where the amount in controversy exceeds $3,000, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, *the head of such department may cause such claim*, with all the vouchers, papers, proofs, and documents pertaining thereto, *to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant;* and the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court for trial and adjudication: *Provided, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason*

of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.

"SEC. 1064. *All cases transmitted by the head of any department, or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.*"

The present claim came before the court by such executive transmission, and the controversy is whether the statutory bar of 1863 applies to claims so transmitted.

The affirmative of this proposition may be rested on either of two constructions which may be given to the legislation in question:

First. That the bar affects not the mere right to sue for a claim, but the subject-matter itself of every claim cognizable by the court, extinguishing it, so to speak, so that, by no power or process, short of special legislative provision, can it be revived or recognized when six years accrued out of the court.

Second. That regarded as a rule for the court only, it affects not only claims brought therein under the legislation existing when it was established, but such other claims as should by subsequent legislation be authorized to be brought there.

I.

The bearing of the first position is manifest. If Congress intended that every claim which could be brought into the court should, when six years accrued, be forever barred unless so brought, then this claim was barred before it was transmitted, and the act of transmission

can in no wise affect that result. Some of the reasons for maintaining this construction are as follows:

1. It is the plain meaning of the text, which is free from ambiguity.

The words are such as are in common legal use, the structure of the clause is simple, and the mode of expression direct. The only suggestion of doubt as to its meaning arises from the fact that the decision of the court seems to require the phrase "cognizable by the Court of Claims" to be taken not as referring to the general description or subject-matter of claims that might be brought before it, but as having some more limited signification. If there is any question as to this it depends on the meaning of the word "cognizable," which is defined as a law term as follows:

"Fitted to be a subject of judicial investigation; capable of being legally or officially heard, tried, and determined; *e. g.*, cognizable both in the ecclesiastical and secular courts."—WEBSTER.

"That may fall under judicial notice; liable to be tried, examined, and judged; *e. g.*, enormities which are not cognizable in any other courts of this realm.—Tatler."—WORCESTER.

These definitions, and especially the examples, show that in legal use the word is applied to matters capable from their nature or description of being made the subjects of judicial investigation. So applied here, the meaning is clear that every claim which is of a nature to be brought in the court shall be barred, unless brought there in the manner and time prescribed.

The majority opinion enters into no direct discussion of this point, but while admitting that the language is "comprehensive" (fol. 9, bottom), avoids its force by declaring, in substance, that the executive departments

have never regarded the provision as affecting their action.

The weight of this argument is well considered in the dissenting opinion (fol. 17), and will be further discussed hereafter. It is enough for the present purpose to show that there is nothing in the language itself to warrant a construction which confines the application of the bar to claims pending in the court.

2. But this conclusion is greatly strengthened if there is evidence that the particular phraseology was chosen because it was intended to create an extraordinary bar, and this is indicated by the peculiar form of the legislative expression.

The court below has, in Kendall's Case (14 C. Cls. R., 122), called especial attention to this peculiarity, showing that it does not, like an ordinary statute of limitation, bar only the right of action, but bars the demand itself. It does not say that no action shall be maintained to recover a claim unless, &c., which would have been all-sufficient if it was only intended to lay down a rule for the court, but it declares that every cognizable claim shall be forever barred unless brought into the court within the time. The change is on its face—such a marked variation from the universal phraseology of limitation statutes as to be undeniably significant of a different intent—and there was abundant reason for it.

3. Passing from the letter of the law, our construction is sustained by the reasons which manifestly led to its enactment.

As between private parties, public policy has established the limitation as a good defense in judicial actions, and it affords the debtor all needed protection. His right to admit a barred demand is personal, and public

policy is not concerned therewith; hence, the limitation statutes uniformly refer to the right of action alone.

Congress, however, was dealing with a different case. For three-quarters of a century no judicial remedy had been provided for the settlement of claims against the United States. Such examination and decision as an executive officer or Congress itself could afford had been the only recourse in matters which, so far as seriously controverted, were peculiarly the subjects of judicial investigation. The evils of such a system were flagrant, and affected, if anything, the public even more than private interest. The inevitable tendency was to promote the accumulation of disputed claims where no suitable means of investigating and deciding them had been provided, and the results were such as to call for a radical change.

The act of 1863 was framed to that end and provides an efficient remedy, the main feature of which is the creation for the first time of a judicial tribunal to hear and determine such disputed claims. But that alone was not enough. It was essential to make sure in some way that the defendants as well as the claimants should get the benefit of the new system, which would but partially accomplish its purpose if resort to it was purely optional with the claimants.

So far as related to its own jurisdiction Congress covered this point by enacting the second section, which provides:

"That all petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract express or implied with the Government of the United States, shall, unless otherwise ordered by resolu-

tion of the House in which the same are presented or introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid."

The case was simple and easily managed because, presumably, the claims presented to Congress would be of the disputed class.

But as regarded the departmental jurisdiction, the case was more complicated. The great majority of claims presented there were undisputed, and needed only to go through the ordinary forms of settlement, for which presentation and settlement a reasonable time after the claim accrued was necessary. So in many cases of dispute, the matter, either in amount or nature, might be of no serious importance and well enough settled in the department. The great danger to the public in all cases was from delay, either in presenting the claim or in its disposition, as a claimant, though refused, could continue to press his case indefinitely, so that some limit to the time and place of contention was necessary.

It was from such considerations, as we conceive, that Congress made the peculiar declaration in question, which, without infringing the just authority of the executive or the rights of claimants, furnishes a complete remedy for the mischief by enforcing either a settlement or resort to the court within six years. As is well remarked in the dissenting opinion, it "placed the government before the law in the position which the private citizen had long occupied, and reserved to the legislature, as the political representative of the nation, the right, which the individual citizen can always exercise, of waving the bar to the statute of limitations.

Much might be added to the foregoing reasons, but, if the statute is as plain as it seems to us to be, it is unnecessary, and we pass to the consideration of some objections raised to our view.

4. These objections are based very largely on assumptions of facts which are not found in the record, and which, we submit, are hardly of a nature to be judicially noticed. Thus it is said substantially that Congress and the executive departments have, since the passage of the act in question, uniformly maintained and acted upon the opposite construction (fol. 9, 3d paragraph). What is meant by sixteen years of uniform contemporaneous construction by Congress is not understood, and, so far as respects the views and practice of the executive departments, the statement, if correct in any sense (as to which we are not advised), is subject to material qualification. It conveys the impression that since March 3, 1863, each department has considered itself free to entertain a claim of any age (for instance, a Revolutionary claim), and to adjust and pay it, although six years accrued. If this were true, it would be a very strong argument in favor of the propriety of the construction for which we contend, but, so far as this department is concerned, the fact is not so understood. Probably all that has been done elsewhere (for opinions of such officers should not be regarded) is that claims presented in season have been acted upon after the six years, treating them just as a court would, and even in such cases it is difficult to see how payment could be made in view of the stringent enactments which regulate the estimates for appropriations, and the mode of their expenditure, and the disposal of balances. (Rev. Stat., Title 41, §§ 3660, 3664, 3678, 3679, 3690, 3691). Examination of these and

other kindred provisions, and of the language used in appropriation acts, will show that instead of the executive officers being given latitude in such matters they are so restricted on every hand by statutes, independent of that under consideration, as to be legally powerless to adjust and pay such a claim.

When it is asserted, therefore, that such a thing has been done it is necessary to understand under what circumstances, for, as in the matter of the public debt alluded to, it may have been done in reliance on a special statutory authority (act February 9, 1847, C. 7, 9 Stat., 123, Rev. Stat.; under Permanent Annual Appropriations p. 725, §§ 3690, 3691). If it has been done contrary to law in every instance, the fact cannot be used to make law.

The additional fact stated that different Secretaries have transmitted cases like the present for adjudication needs the qualification that they have all come from the same department. Whatever inference may be drawn from that fact cannot, therefore, be extended to those not concerned.

The fundamental defect in any effort to make out a case of contemporaneous construction is clearly exposed in the dissenting opinion (fol. 17), but it seems proper to direct attention to the danger of resting such a conclusion on any loose, indefinite, or inaccurate assumptions of fact. It is easy to make such statements, but as difficult as it is necessary to prove them, if they are to be admitted to affect the rights of parties in a case like this.

The feeling which animates the objections to our construction we respect. It is thought apparently that it would occasion hardship and even injustice to claimants and public creditors, but there is great danger of being

misled by the imagination in such considerations. Take, for instance, the statements at fol. 10, par. 3, and fol. 14, par. 1, in which it is assumed in one case that a claim presented to the department "in due time" is not transmitted until six years accrued, the department being held responsible for the delay; in the other "that with the utmost diligence which a claimant can exercise it is often more than six years before final departmental action can be obtained upon his claim."

It may be that in the deluge of claims to which the war gave rise some branch of a department was so overwhelmed as to be unable with its working force, with all diligence, to reach some or many of the claims until six years after they were presented. If so, it was not the fault of the department, but of Congress, in not providing an adequate force to sooner dispose of them, and a circumstance so exceptional would not justify any imputations or unqualified statement of departmental delay.

Aside from the existence of such extraordinary cases, we venture to assert that an instance cannot be produced in which, after a claimant has finally submitted his claim, a department has neglected final action thereon for six years, "however he may urge his claim." The real causes of unusual delay in departmental action on claims may be easily explained.

In the first place, the claimant may delay the presentation of his claim. If he did not file it until it was nearly six years accrued, would he or the court have a right to hold the department responsible for delay in not acting on it within the six years? Again, as in the case at bar, the claim is seasonably presented and is *refused* (as the claimant swears, petition, art. 7). The claimant (as the court say) continues to press its settlement for thir-

teen years, and finally it is transmitted to the court. Is the fact that he would not take no for answer, and was able in the end to induce the Secretary to refer the case to the court, to be imputed as an injurious delay?

It hardly needed a case like this to solve the difficulty, for the causes of delay are quite notorious. A mere matter of accounting is rapidly passed, but some claims are disputable or disputed, and time is taken by the claimants to produce proofs. If the decision is, or is expected to be, unfavorable, opportunity to produce further proofs and arguments is sought, and the more doubtful the case the more ingeniously and persistently is it protracted and pressed at every favorable opportunity, and the greater the reluctance (noticed by the majority opinion, fol. 10, par. 1, 3, 4) to seek or be sent to the court. If, in this way, the period of limitation is passed, is all the blame, or any of it, to be charged to the department?

The conclusive answer, however, to the charge is that no neglect or omission of a department to act can injuriously affect a claimant without contributory negligence on his part. For six years the court stands open to him, and he need not submit to executive delay a day longer than he chooses. If he prefers to wait in a department thirteen years for action, when he could get it in three months in the court, he has no right to complain of the result. The law, at least, is not to blame.

We have endeavored to show that the alleged hardships which would result from our construction are unfounded suppositions. If in any case or class of cases real inconvenience or injustice should be experienced, legislative relief would unquestionably be extended. To refuse to carry out a law because it is deemed impolitic,

or because difficulties in its execution are apprehended, is no part of the judicial function, as this court has repeatedly held.

5. Besides stating the arguments in favor of our position, and answering the objections to it, a statement of objections to the construction adopted is offered.

That it does not accord with the ordinary meaning of the language employed, if ours does, must be admitted. So, also, if we assume that Congress intended to create a bar to a recovery in the court alone, the remarkable variation from the terms universally employed in statutes to express that intent and the adoption of terms expressive of a different purpose is inexplicable; and, in this connection, attention may be called to section 1 of the Hot Springs act (16 Stat., 149) as a similar provision, and manifestly having the same effect.

But the vital objection rests on the reason of the case. If the construction adopted is not apparent on the face of the enactment, the burden is on its supporters to show why the bar should not in reason apply to the executive as well as the judicial action; but this is not attempted. It is well to consider it.

The court was a necessity, though Congress was slow to concede it. It was created as much for the protection of the government as of claimants. Before its organization claims were adjusted by some public agent, usually on the *ex-parte* proofs of the claimant. In the executive departments, from the necessity of the case, the decisions in most cases practically devolved on some subordinate, whose qualifications for the duty were rendered more or less uncertain by various conditions affecting the civil service. To expect claims involving complicated issues of law and fact to be satisfactorily adjusted

by such means was unreasonable. Such claims if rejected found their way to Congress, which was not much better qualified to determine them, or continued to be pressed on the departments. By lapse of time in the final disposition of claims all the evils of the system were exaggerated, and when the war began to swell the volume of such contentions Congress realized that a change of system could no longer be delayed.

Reading its remedial enactment by the light of the causes which required it, can it be doubted that the unlimited presentation and pursuance of claims against the government before its officers was a predominant motive of the new departure? What other reason can be assigned for creating the bar? The court had not previously existed as a court, so there could be no evil connected with the prosecution of claims before it which could furnish a motive to select it as the especial and only object of the provision, but strangely enough the majority of the court are of opinion that it was nevertheless intended to so distinguish or rather to so stigmatize it, for they in effect say "Congress deliberately proposed to suffer every claim of the description which we were especially created to determine, to be forever presentable and determinable before the executive departments, but to forever bar its judicial determination before us and the Supreme Court when six years accrued."

Is it to be presumed, in the face of language conveying the opposite meaning, that Congress intended to make a distinction so derogatory to the character of the new court and to the judicial dignity in general? Can any good reason be given why a claim against government should not be closed by some form of adjustment or submission to judgment within six years? Does not the

impersonality of the defendant afford the strongest reasons for such a rule? Can any claimant justly complain that the law says to him, "If for any reason your claim is not allowed out of the court in six years, you can have no recovery unless you make timely application to the court"? Is it a hardship or injury to be referred, after six years of opportunity in a department, to the Court of Claims? Is the departmental process better adapted to the investigation and decision of an issue of fact or law after six years, or at any time, than that of a tribunal in which the approved integrity, learning, experience, and personal investigation of five judges, aided by all the accessories of compulsory process, cross-examination of witnesses, and the labors and contention of opposing counsel, with right of revision of the law by this court, sanction the judgment? If Congress intended any distinction, would not the true policy have been to bar claims in the departments after six years, and give unlimited access to the court? To sustain the judgment some satisfactory answer must be found to these and many similar questions.

Attention to the immediate context, as contained in the first proviso (omitted in the revision), adds confirmation to our view. It creates a three years' bar for cases excepted from and which would have been barred by the enacting clause, as follows: "*Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act."

In so providing, Congress either intended, so to speak, to drive all such stale claims into the court in a short time on penalty of forfeiture of the subject-matter, or to

give the claimants a short option to do as they pleased about it, with no penalty but loss of the right to sue. If an option only was intended, what particular reason was there to shorten the time? For example, the court has just tried a Revolutionary claim brought under this proviso, and which has, therefore, been pending therein about fourteen years. Would it have made any difference if the full time of six years had been allowed for option to sue if it did not otherwise affect the claim? The other view gives some point to the change of time. By it, Congress says, "We are determined to make an end of old claims. Presumably you have had your day in the departments, or elsewhere, in the past seventy-odd years. We will not cut you off without remedy, but have provided a court, and give you three years' notice to avail yourselves of it or lose your claims." Is there anything unjust or unreasonable in such a provision? Is it not rather a necessary measure for protection of the public interest? If all are obliged to submit to judicial investigation, not only the good claims will pass, but the unworthy will be finally disposed of, which was one of the chief ends of establishing the court. On the claimants' view, the claims which Congress was especially anxious to reach are untouched, for, as judicial investigation would be the thing most dreaded, the claimants would be sure to avoid the court.

We conclude, therefore, on this point that the law is plain; that it means just what it says; that it is in accordance with reason and right; and that the courts are bound to give it full force and effect, whether it has been elsewhere obeyed or not, and even if they should have doubts of its policy.

II.

Conceding, for the sake of argument, that Congress intended by the clause in question to create a bar which should be applicable only in the court, it remains to be considered why it is not as applicable there to a suit brought there under the act of June 25, 1868, as to one brought there under the act of March 3, 1863.

Consider first the following facts: On, say, August 1, 1864, a claim for commutation had accrued to Colonel Lippitt, cognizable by the court, on which he could have forthwith brought suit. By existing law his right of recovery in the court was forever barred on August 1, 1870, unless he brought suit before that day. He did not so bring suit, and there is no question that his claim is barred, unless the act of June 25, 1868, relied on, in some way prevents the bar of 1863 from being enforced in his case, as it would be but for the executive reference. If the act of 1868 has this effect, it must be because it has to that extent repealed the prior act, or (which is the same thing) has engrafted an exception on it, so that it must now be read: "Every claim, *except such claims as the head of a department shall transmit*, shall be forever barred," &c. It is substantially re-enacted in the revision in sections 1063, 1064, already cited at length, and of which we extract here only so much as is necessary to illustrate the present point:

SEC. 1063. Whenever any claim is made against any executive department, * * * the head of such department may cause such claim * * * to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant: * * * *Provided*,

That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might under existing laws take jurisdiction of on such voluntary action of the claimant.

SEC. 1064. "All cases so transmitted * * * shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations."

This act, by its subject-matter and by direct reference, is so connected with the prior law as to be clearly *in pari materia*, and as no repealing intent is expressed, the burden of proving it by necessary implication rests on those who claim the benefit of it. We need only to consider, therefore, the sufficiency of the arguments in that behalf set forth.

The chief of these is that the two acts differ in their subject-matter. Thus, at folio 12, it is observed that when it was enacted that a transmitted claim should be barred, the reference was to the only form of transmittal then provided—which is true; but the Chief Justice then proceeds to comment on the absence in the subsequent statute providing another mode of transmittal of anything to indicate that the bar was extended to it, and to cite the phrase "whenever any claim is made upon said department" as importing that it was not (par. 4).

That the bar was extended to every subject-matter within the jurisdiction at the time is no evidence that it was intended to exclude similar matters which might subsequently be added, as is well settled (Cliequot's Champagne, 3 Wal., 114; Adams *vs.* Woods, 2 Cranch, 336).

No adoption or reference to the bar was needed in the act of 1868 to secure its operation, but an express ex-

clusion would rather be required to avoid it, and, as the only reliance is on the indefinite term "whenever," that must be taken by the court at least as subordinate to a statute positively limiting its action. In Faw *vs.* Marsteller (2 Cr., 24) this court said:

"In searching for the literal construction of an act, it would seem to be generally true that positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restrained by applying to those cases an implication drawn from subsequent words, unless that implication be very clear, necessary, and irresistible."

Again, at folio 10, the point is made that the two statutes were enacted for entirely different purposes—the one conferring on the claimant a right of action against the government, the other conferring on the executive departments a judicial means of investigation against claimants—and that their modes of proceeding differ.

This assumes what is not conceded. Examination of the act of 1863 proves that the statement of its purpose is too limited. It did not merely confer a right on the claimant, but a judicial means of investigation against claimants as well. In section 2 it does just what the act of 1868 does, but more effectually. It directs every cognizable claim presented to it to be sent to the court as of course, reserving only the right to make exceptions; thus notifying claimants that if they did not go to the court Congress would send them there. It thus provides for a transmittal procedure for defendant's benefit in all substantial respects like that of the later act. In each case the transmittable cases are confined by description to such as are cognizable by the court; are to be proceeded with in the same way, and to be in all respects subject to the same rules and regulations (Rev.

Stats., §§ 1063, 1064), and in each the transmittal gives jurisdiction. There is no difference of procedure indicated in the statutes, and we see no reason why there should be any in practice, or why it should be deemed material if it exists. But however that may be, with such striking analogies of substance, how can it be maintained that there is any material difference in the purpose or subject-matter of the acts? They each invest the same court with jurisdiction to hear and determine the same class of cases by the same process (differing only as to the sources of transmittal) and for the same end—the protection of the United States (folio 14, par. 3). Why, then, should they not be subject to the same rules in the court when Congress expressly says they shall (Rev. Stats., § 1064)? When *Congress* sends a case to the court the bar applies. Why should it be doubted that the rule laid down to govern their own transmittals was intended to apply to any other transmittals they should authorize?

1. One reason assigned is that Congress, having given authority to transmit a claim representative of a class and claims involving constitutional questions, it could not have intended that in any such case a consideration of the questions involved should be stopped *in limine* by a plea of limitation (folio 13, par. 3, 4).

This is plausible, but the fallacy in it can be seen by taking a parallel case. To such a transmitted claim the defendants file a plea, under section 1068, Revised Statutes, that the claimant is an alien not entitled to sue, setting forth facts sufficient to sustain the plea, and the claimant demurs and sets up the same argument that such a plea will prevent a decision on the merits, and Congress cannot have intended to admit it. Would not

the plain answer be that, although the general object was to get a decision on the merits, it could only be attained in conformity with existing law; and that if the department head would lawfully invoke the aid of the court he should transmit a suit capable of decision on the point desired, and not a case which, on account of an independent defense, would be a mere moot case on the point in question.

There could be no practical difficulty in so doing. It would be extraordinary indeed if no case of a class could be found that would not be barred; and if the Secretary was really anxious to be enlightened by the courts on a point of constitutional law, he would not need or take six years to get it before them.

2. Another reason assigned is to the effect that, as was attempted in the Winissimet case, the department head might send the case to court for the purpose of having the bar interposed (folio 13, par. 5). Well, why not? Was there any legal or moral wrong in the attempt? Unless that is assumed, we can see no force in the argument.

In Kendall's case the court held that it would enforce the bar without regard to the action of the defendant's agents, and there is no dispute that it is so bound as to all claims, unless the class in question form an exception. Is it supposable that in requiring such action Congress has imposed a duty that is discreditable or unjust? The views of this court on that subject have often been emphatically announced, and we need only cite the following expressions of them:

"This court has not adopted the rule of decision made at one time in England, and to some extent in this country, under which, by a constructive equity, judicial

refinements came near to abolish the statute altogether." (Wilder's Case, 13 Wal., 256.) "It has often been matter of regret in modern times that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defense, it had received such support as would have made it what it was intended to be emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. *It has manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time and baffle every honest effort to counteract or overcome them.*" (Bell *vs.* Morrison, 1 Pet., 360. See also Clemenson *vs.* Williams, 8 Cranch, 72; McCluny *vs.* Silliman, 3 Pet., 270.)

If, then, it is entirely just and proper to enforce the bar in every claim before the court, except the dozen or so that have been sent from the departments, what reason can be assigned to prove that it is not equally just and proper to enforce it in those? And if it is proper for the court to enforce it, why is it improper for the Secretary to seek its enforcement? A good deal is said about decision on the "merits," but what are the merits of a barred claim? Are they not quite as imperceptible as the treason of a pardoned rebel before the court?

But apart from the abstract proposition, the very language of the Secretary cited (fol. 14, top) contains a sufficient justification. The claim was sent to enforce the bar against "*these renewed or continued demands.*" Apparently it had been decided on the "merits" in the Secretary's department repeatedly, and there was urgent

need of just such a bar as we believe the statute intended to give for his relief, and which we are now seeking to have enforced. Certainly there is nothing presented in connection with the case then under consideration, or any other case, to justify the argument of possible treachery toward a claimant, and we decline to discuss it.

3. It is argued that if the Attorney-General may throw a transmitted claim out of court by setting up the statute, the extraordinary spectacle of a conflict between two executive departments is presented (fol. 14, par. 3).

The Attorney-General can only throw the claim out if the law supports him; and if it does, it will no doubt be agreed that as departments as well as courts are subject to the law, there can be no conflict when the law has spoken. Not even the suspicion (which surely could not be founded on the reason assigned for referring the Winnissimmet case) of thwarting the purpose of some other executive officer can relieve the Attorney-General of his responsibility for the exercise of his own judgment in a matter of statutory construction not judicially established, and, so far as informed, this department has invariably asserted the validity of the bar by interposing it in such cases as the other departments well know. Now, for the first time, the question has reached this court, and the duty as well as the right to present it can hardly be questioned.

4. Finally, it is supposed that the act of 1868 was passed to enable the head of a department who objected to the allowance of a claim by a Comptroller to carry the matter before the court, and it is inferred that the court can only consider such questions as might arise before a Comptroller, excluding that of limitation (fol 15, par. 2).

theory than that he did not consider himself entitled. Possibly he did not wish to sign the certificate to the voucher for commutation received before he could get his pay, to wit: That he had been regularly stationed at San Francisco "*on duty*," &c.

His claim is evidently an afterthought.

This regulation also shows that an officer *may be* at a station and not entitled.

2. San Francisco was not to him a station within the meaning of Regulation 1080. To be entitled, he must be ordered to a station *on some duty.*

Paragraph 61 of Regulations 1821, above cited, state that a temporary absence of an officer from his station "*on duty*" will not deprive him of his quarters, &c., that is, if thus absent *not* on duty he will not be entitled. He is still an officer with a station.

Paragraph 42 of 1835 says: When an officer arrives at his post to which he is ordered (*if he is entitled*) he will make requisition on the quartermaster, "*accompanied by a copy of the order placing him on duty.*"

The first regulation allowing *commutation* appears to have been in 1835, which provides that at stations where officers *serve* without troops, and where there are no public quarters, authority is given to hire them, or *allow a reasonable compensation for them.*

Officers "*assigned to stations*" will not be removed *unless required for duty in the field, &c.*

An officer shall visit the "stations" of other officers "*for the purpose of inspection and supervision.*"

What was claimant doing that needed inspection, or supervision, or to prevent his removal to some duty at any time?

Our view is sustained by the decision of this court in

Phisterer's case (94 U. S., 219), in which the court say (p. 224) quarters or commutation are allowed by the government "upon the assumption, first, that officers are actually engaged in the public service; and, second, that such quarters *are necessary to the discharge of their duty.*"

Can that possibly be said in this case, when the facts show so clearly that claimant was not only not ordered to and did not do any duty during the time in question, but never even reported at headquarters, from which any orders would be received, *but once during the twelve months he was in the city doing nothing.*

In our opinion this case cannot be distinguished in principle from Phisterer's? In that case he was ordered to his home to await orders. The court say: "In the broadest use of language, no doubt the word 'station' means a place or position, and it may be said that wherever a man in pursuance of orders *stays or remains*, he is stationed, and that, if he is a military man, such place becomes a military 'station'"; and then decided that although his home was a military station *in that sense*, it was not a station within the meaning of the regulations to entitle him to commutation, "having no public duty to perform."

So, in this case, claimant was a Californian, in command of a California regiment, and, so far as appears to the contrary, San Francisco was his home. But whether so or not, it is clearly within the principle that it was not to him such a station as to entitle him to recover.

It may fairly be inferred *from the regulation itself* that it is *for duty;* for it says that where an officer is *employed* on a civil work his commutation shall be charged to that appropriation. "Employed!" But again, this court says

in the case of Gratiot *vs.* United States (4 How., 117), that "as to the Army Regulations, this court has too repeatedly said that they have the force of law to make it proper to discuss that point anew."

One regulation, above cited, is that to receive commutation an officer must certify that he has "*been regularly stationed on duty*" at the post where it is claimed, and by whose order, and has not been furnished with quarters, &c., and *the post quartermaster must certify that he could not have been furnished*—not only stationed, but on some duty. If that has the force of law, it settles this question.

If claimant, perhaps, could not make that certificate, will the court give him indirectly what he could not properly obtain directly? Of course it will not be claimed that the officers then stationed at San Francisco who received commutation were *awaiting orders*, as there is no such proof.

In the opinion of the court below, it is urged that claimant was entitled to fuel and quarters, because he was not ordered to his home as in Phisterer's case, nor to the city of San Francisco, but to the headquarters of the military department. This court says, in Williamson's case (23 How., 416), "Captain Williamson was not only justified in obeying this order" (he was ordered to his home to await orders), "but it was his duty to obey it. It was his duty to proceed to his home, *there to remain*, subject to orders to be communicated to him. He did proceed to his home and there remain *waiting for orders*, until," &c. Substitute San Francisco or headquarters for "his home," and every word of this language will apply to claimant. He certainly did not consider himself very intimately attached to the headquarters for

duty, &c., as he did not show himself there but once in twelve months. He was no more on duty in his lodging-house at San Francisco than Williamson or Phisterer in their homes. Each was awaiting orders for duty. "*Duty*" is legibly stamped upon every step connected with a station at which an officer may receive commutation. It can hardly be fairly claimed under the circumstances that claimant needed four rooms and one kitchen, and an average of two cords of wood per month to do absolutely nothing.

The court will undoubtedly agree with us, that if recovery can be had in this case, the law cannot be changed too speedily.

3. If the court shall find that the petitioner is within the letter of the law, then we say that he should not recover, because he did not comply with the clear conditions precedent to his right of recovery, to wit, did not make requisition on the proper officer for quarters and fuel. It might not be a strained conclusion from the evidence to say that there were no quarters for him, but, although most of the officers received commutation, *some may not;* and if *some* were furnished, claimant *may* also have obtained them. It will not fail of notice that the court *has not found* as a fact *they could not have been furnished.* He could and should have made this point clear. The department at Washington may or may not know whether or not there were quarters there in 1865.

4. It will do no wrong or injustice to claimant if he is not allowed to recover.

During all this time he was receiving his monthly regular pay at some $3,000 a year, and shall he receive a bonus of $1,742 for doing nothing?

If claimant was with his regiment he would not be en-

titled. There he must support himself. He did no more in San Francisco. He lived during the time very economically, in a lodging-house, as stated in the petition. He had no need ot, and did not hire, or occupy, or pay for, four rooms and a kitchen, and should he be now paid for it as if he had?

No reason is shown, or can be found, why an officer should have such quarters, or commutation for them, where he does not need them in the performance of some duty; hence claimant ought not to recover for them.

CHARLES DEVENS,
Attorney-General.
THOMAS SIMONS,
Assistant Attorney-General.

ALBERT D. ROBINSON,
Of Counsel.

OFFICE SUPREME COURT U. S.
FILED
MAR 2 1880
D. W. MIDDLETON, Clerk.

In the Supreme Court of the United States.

THE UNITED STATES
vs.
FRANCIS J. LIPPITT.

No. 879.

STATEMENT OF FACTS.

The statement of facts in the appellant's brief, is inaccurate in some particulars:

The appellee while awaiting orders in San Francisco, was *absent from his regiment.*

Rec., p. 3, 3d finding.

The statement in the appellant's brief, (p. 2, top of the page), is not in the language of the finding, which is this:

"There is no evidence that they (*i. e.*, quarters and fuel) could have been furnished in kind. The records of the War Department show that most, *if not all*, the officers stationed at San Francisco, received commutation of quarters and fuel."

Rec., p. 3, fol.

The statement (p. 2, appellant's brief) is, that the appellee "did not again report himself, at headquarters after his first report on his arrival." The finding is "*that it does not appear*, that he reported himself at headquarters, San Francisco, after his first report on his arrival there."

Rec., pp. 3 and 4, 7th finding.

The statement (p. 2, appellant's brief) is that appellee "made no demand on the proper officer that quarters and

fuel be furnished him." The finding is that *it does not appear* that he made any demand.

Rec., p. 4, finding 8.

The fact of reporting at headquarters and of making the demand are facts peculiarly within the knowledge of the appellee; but he had no right to testify, and he was not required by the appellant to testify. *Direct* proof on these points could not, under the circumstances, be looked for and no presumption arises from its absence. The claimant has done the best he could, by showing that he was at San Francisco awaiting orders. If it be true, in fact, that he made no demand (which is not conceded), he has shown that a demand would have been fruitless.

There is no proof of the statement (p. 3) that the claimant is a Californian, or for the inference that he had his home in San Francisco; the allegation of his petition (cited brief, p. 36) is just the reverse.

Rec., p. 1.

There is no proof of the statement (pp. 31 and 32) that the appellee's claim is an afterthought.

There is no ground for the inference (p. 30) that the claim has not been before a comptroller.

The claimant pressed his claim before the War Department from 1865 to January 9, 1878.

Rec., p. 8.

Points and Authorities:

Two questions arise on the record.

1. Is the claim barred by the lapse of time?

2. Is the judgment below right on the merits of the case?

As to the Statute of Limitations:

I.

The Statute of Limitations must be construed strictly.

Angell on Limitations, § 485.

II.

The statute in question, Sec. 1069 of the Revised Statutes, does not extinguish the right but only bars the remedy in the Court of Claims. It is a law of the forum.

1. The provision must be taken "*secundum subjectam materiem.*" It is one of several provisions of "an act to amend 'an act to establish a court for the investigation of claims against the United States.'" (XII. S. L., 765.) It must be construed in reference to the context as applying only to the remedy in the Court of Claims.

2. The whole language is that of a Statute of Limitations and not of a statute of prescription. It operates by its terms on the remedy and not on the right.

3. This has been the uniform construction given to it by the Departments and acquiesced in by Congress.

Such construction and acquiescence have great weight in this court.

Mrs. Alexander's Case, 12 Wall., 177.

"It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. Edward's Lessee *vs.* Darby, 12 Wheat., 210. While, therefore, the question is one by no means free from doubt, we are not inclined to intefere at this late day with a rule which has been acted upon by the Court of Claims and the Executive for so long a time."

Pugh's Case, 99 U. S., p. 269.

As stated in the opinion of the Court of Claims, to hold that the right against the United States is absolutely extinguished by this statute will have the effect of destroy-

ing the rights of a large number of bond creditors of the United States. By the January statement of the public debt, the amount due by bond which would be affected by this decision is about $1,296,848.53.

III.

Assuming that the present statute does not extinguish claims against the United States but only bars the remedy by suit in the Court of Claims, the question is whether the statute applies to cases brought into the Court of Claims by the heads of Departments. Is the right given by Sec. 1063, R. S., to the heads of Departments to ask the aid of the Court of Claims affected by Sec. 1069?

The question may be stated thus: Is the right of the head of a Department to transmit to the Court of Claims for its action a claim against the United States, which was presented to him the year after it accrued, which involves questions of law which depends upon a principle affecting a class of cases, barred if not exercised in six years from the time such claim accrued?

If he has failed to exercise his right within six years, must he forego the aid of the Court of Claims and consider for himself and pay claims which he had not referred in time to the Court of Claims within six years after accrual?

IV.

The present case is clearly not within the *language* of the statute.

That language is as follows:

"Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the Court or transmitted to it by the Secretary of the Senate or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues"

1. This claim reaches the court in neither one of the two ways indicated in the statute; it comes in *neither by petition nor by a reference by the Senate or House.*

The statute designates specifically the classes of cases it is meant to apply to, and this designation is by the methods in which the cases come to the court.

The statute contains no general words which might include cases not specifically designated.

The statute being thus specific, and the present case not being within its language, it would be a violation of the rule which requires such a statute to be strictly construed, to hold that this case is within its purview.

2. An important circumstance in this case is that when this Statute of Limitations was enacted the right of heads of Departments to refer cases to the Court of Claims did not exist.

The present section 1069 of the Revised Statutes containing the Statute of Limitations was enacted on the 3d of March, 1863. (12 S. L., 765.) Section 1063 giving to heads of Departments the right to refer cases to the Court of Claims was enacted on the 25th of June, 1868. (15 S. L., 75.)

It thus appears that when these limitations were enacted the case to which it is now sought to apply them was not in existence and could not have been in the contemplation of Congress. This fact might have been sufficient ground for holding that the cases arising under section 1063 are not within section 1069, even if the latter had contained general words which might be held to conclude the present case; it should be decisive when it is considered that section 1069 contains no general words.

3. When the Revised Statutes were enacted, the act of 1868 was embodied in section 1063, and the Statute of Limitations in a subsequent section, 1069. Yet no change was made in the phraseology of the latter, which is still confined to the two specified claims.

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V.

But if resort is had to the reason or principle on which Statutes of Limitations rest, the right of the head of a Department to refer such cases to the Court of Claims is clearly not within that reason or principle.

Judge Story has thus expressed the purpose of Statutes of Limitations:

"The Statute of Limitation is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from lapse of time or defective memory or death."

From this it appears that the statute is meant; 1st, to apply to stale claims; 2d, to bar their prosecution.

The present statute if applied as contended for, would operate in neither of these ways.

1st. This claim is in no sense stale. It was presented within a year after it accrued.

2d. The effect of the statute is not to bar the prosecution of the claim. The head of a Department may still consider it, and pay it. The only effect of the statute would be to bar the prosecution of the claim in the Court of Claims, and to leave it for prosecution in a Department. It keeps the claimant out of one of two forums of concurrent jurisdiction.

In Clarke's case, 96 U. S., 43, "a claim against the United States" was held not to be barred by § 1069.

VI.

The argument from convenience is entirely against the view of the appellant. From the point of view of the interests of the Government, there could be no hesitation in accepting any construction of the law, which would give the adjudication of a claim to the Court of Claims, rather than leave it with the head of a Department.

More particularly is this so in the cases embraced in section 1063; 1, Cases involving difficult questions of law and fact; 2, Cases furnishing a precedent; 3, Cases involving constitutional questions.

VII.

The claimant's omission to appear in the Court of Claims on his own behalf within six years, is entirely due to the act of the Government's agent. It will work a great injustice to him after he had been kept so long in attendance on the Department, to take away his remedy in the Court of Claims. If a person fails to sue in the ordinary way in six years, the "delay is exclusively attributable to his own neglect; and the bar directly the result of his own laches." Here, there is neither neglect nor laches on the part of the claimant. He is charged with laches because he applied to the ordinary tribunal, having jurisdiction of his claim, and patiently awaited its action.

VIII.

The section (1063) contains a proviso defining the relations of the referred cases to the general jurisdiction of the Court of Claims; it is in these words:

"Provided, however, that no case shall be referred by any head of a Department, unless it belong to one of the several classes of cases to which by reason of the subject-matter and character, the said Court of Claims might under existing laws take jurisdiction on such voluntary action of the claimant."

The statute thus exactly defines how far the referred cases must be within the court's general jurisdiction. This expression of a restriction upon the cases referable is an exclusion of other restrictions, under the ordinary rule of construction. Would Congress not, while restricting the right to refer to cases within the jurisdiction of the Court of Claims as to subject-matter, have also restricted it to cases within its jurisdiction, as to time, if such latter restriction had been intended?

IX.

If it be assumed for the sake of argument, that section 1069 Revised Statutes was meant to extinguish those rights to which it applies, the reasons above assigned go to show that the cases within 1063, are excepted from the operation of § 1069.

It is conceded that the exception would not be so clearly for the benefit of the Government. But the facts that the power of reference is in the hands of a high official of the Government, and is restricted to a certain limited class of cases, are safeguards against the abuse of the power.

As to the merits:

The claimant's rights depends on section 1080, army regulations.

"When public quarters cannot be furnished to officers at stations without troops, or to enlisted men at general or department headquarter, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market price delivered."

The claimant was ordered away from his regiment, to report in person at the headquarters of his department, there to await further orders. The headquarters were in San Francisco, where the claimant reported and actually awaited his orders.

The whole question is: Was he at a station without troops?

It is very clear that the claimant was literally at a station without troops.

The principle of this allowance is that stated in Phisterer's case, 94 U. S., 221:

"Quarters are expected to be furnished by the Government to its officers. When it cannot thus furnish, it allows them to be obtained otherwise, and pays a money

compensation therefor, called commutation. This is upon the assumption, first, that the officers are actually engaged in public service; and, second, that such quarters are necessary to the discharge of their duty. It is upon the latter idea, that commutation for fuel and quarters is not allowed to officers in the field."

That awaiting orders is being engaged in the public service was settled in U. S. *vs.* Williamson, 23 Wall., 415.

"The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place, and to remain at that place. He cannot go elsewhere, he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time."

Phisterer was ordered to his home at his own request, and was not within the principle.

As pointed out by the Court of Claims, this case is stronger, for the claimant was not ordered to await his orders at a particular place, but at the headquarters of the Department. That quarters were necessary in a city, is obvious.

If a demand for quarters was necessary, the findings show that there were no quarters for officers in San Francisco. That fact relieved him from demanding quarters.

JAMES LOWNDES,
Attorney for Appellee.

An act to amend "an Act to establish a Court for the Investigation of Claims against the United States" approved February 25, 1855.

Sec. 10. *And be it further enacted*, That every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition setting forth a statement of the claim be filed in the Court or transmitted to it under the provision of this act within six years after the claim first accrues.

XII Statutes at Large, p. 765, and now Sec. 1069, R. S.

An act to provide for appeals from the Court of Claims and for other purposes.

SEC. 7. *And be it further enacted*, That it shall and may be lawful for the head of any Executive Department, whenever any claim is made upon said Department involving disputed facts or controverted questions of law, when the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any Executive Department in the adjustment of any class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims to be there proceeded in as if originally commenced by the voluntary action of the claimant.

XIV S. L., p. 457, and now Sec. 1063, R. S.

In the Supreme Court of the United States.

October Term, 1879.

No. 879.

THE UNITED STATES, Appellant,

vs.

FRANCIS J. LIPPITT.

Argument of John J. Weed and Thomas Wilson.

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Supreme Court of the United States.

THE UNITED STATES, *Appellant*,
vs.
FRANCIS J. LIPPITT. } No. 879.

Argument for Appellee, as to the sufficiency of the plea of the Statute of Limitations, to bar a claim transmitted to the Court of Claims, by the head of an Executive Department, as provided in the 7th Section of the Act of Congress, approved June 25, 1868, and incorporated in the Revised Statutes as Sections 1063, 1064, and 1065.

The undersigned, acknowledging the courtesy of the counsel for the appellee in permitting him to take part in the discussion of the above question, avails himself of that permission, not because he is so presumptuous as to assume that he can add anything do the clearness or force of the propositions which the learned attorney for the appellee has presented to the Court, in the brief submitted by him as the basis of the oral argument which he proposes to make. The undersigned finds justification in the seeming presumption which inspires this argument, in the fact that he represents in the Court of Claims other cases, not yet decided, that must be determined by the decision which this Court shall make of the questions involved in the case under consideration.

The language of the act under which this case was transmitted to the Court of Claims is as follows :

SEC. 7. That it shall and may be lawful for the head of any Executive Department, *whenever* any claim is made upon said Department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision

will effect a class of cases or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouches, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant. And the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described or limited in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said Court of Claims, for trial and adjudication: *Provided, however*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases to which, by reason of the subject-matter and character, the said Court of Claims might, under existing laws, take jurisdiction on such voluntary action of the claimant. And all the cases mentioned in this section which shall be transmitted by the head of any Executive Department, or upon the certificate of any Auditor or Comptroller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subjected to the same rules and regulations; and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States shall be allowed in the manner now provided by law. The amount of the final judgments or decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropration exists, the same shall be paid in the same manner as other judgments of said court.

The provisions of this statute, with the exception of that part which relates to the right of appeal from the judgments rendered under its provisions, are incorporated in the Revised Statutes, as sections 1063, 1064 and 1065. The right of appeal to this Court, in all cases where a judgment is rendered against the United States, is conferred by Section 707 of the Revised Statutes.

So much of the Statute of Limitations as is material to this discussion is as follows:

"That every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition, setting forth a statement of the claim, be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues." (12 St. L., 767).

This provision is found in the 10th section of the act providing for the re-organization of the Court of Claims, approved March 3, 1863; and is incorporated in the Revise Statutes, section 1069.

It would seem too clear for argument to assume that the above statute of limitations which is interposed as a defense to this action, is not sufficient to preclude the appellee from his right to maintain in the Court of Claims, *the suit which was instituted there, not at the instance or by the voluntary action of the appellee*, but by the act of the Secretary of War, who for that purpose under the statute, was the United States. The appellee had his option to present his claim to the proper Executive Department for settlement or to file his petition in the Court of Claims. He elected to pursue the first of these remedies, and in 1865, he presented his claim to the War Department, where it remained unsettled until January, 1878, when it was transmitted to the Court of Claims, for "*trial and adjudication;*" because the decision of that Court would affect a class of cases, and furnish a precedent for the future action of the War Department, in the adjustment of a class of cases.

It is to be observed in considering the peculiar language of this statute:

I. That it contains no *limitation* as to the *time* when the head of an Executive Department may exercise the right conferred by its provisions. He may exercise the right "*whenever*" any claim is made upon his Department,

which presents for consideration either of the following questions:

1st. Where the claim involves disputed facts or controverted questions of law, and the amount in controversy exceeds three thousand dollars.

2d. Where the decision will affect a class of cases, or furnish a precedent for the future act of any Executive Department in the adjustment of a class of cases, without regard to the amount involved.

3d. Where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States.

There is but *one* limitation upon the authority of the head of an Executive Department to transmit to the Court of Claims, any case where either of the foregoing questions arise. That *limitation* is in the proviso contained in the section above quoted, which declares that no case shall be so referred, "*unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said Court of Claims might, under existing laws, take jurisdiction on the voluntary action of the claimant.*

The cause of action stated in the petition of the appellee in the Court of Claims, was within the jurisdiction of that court, as prescribed by the laws existing at the time the Secretary of War exercised his right to transmit the case to the Court of Claims for "*trial and adjudication.*"

The original jurisdiction of the Court of Claims was conferred by the act of Congress approved February 24, 1855, in the following language:

"* * * * and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either House of Congress.

Under the provisions of this statute, the Court of Claims could acquire jurisdiction of a cause in but two ways:

1st. By the petition of the claimant voluntarily filed therein; 2d. By reference of any claim to that court, by either House of Congress.

The United States, acting through its Executive Departments, could not, by the terms of this act, invoke the jurisdiction of the Court of Claims for any purpose. It must settle the claims made upon it in the old way upon *ex parte* evidence, and without any investigation, having the slightest resemblance to a judicial examination or determination of the matters to be decided. It mattered not, if matters of the gravest public concern were involved, in the settlement of the private claims of the citizens; and, although the matter which might be the subject of contention should be vast in amount, the evidence conflicting and doubtful, and the legal questions involved important and delicate, there was no *judicial* forum to which the United States might remit the controversy for decision. This was the evil, and the need for which the statute under consideration intended to make provision, and these are always to be considered in construing a *remedial* statute. Its purpose and object was to prescribe a means by which the United States might secure to itself the benefit and advantage of a judicial determination of any controversy, in which it might be involved with the citizen, in any one of the Executive Departments.

II. In any case transmitted to the Court of Claims, under the provisions of that statute, the United States, acting through the head of its Executive Departments, is the *actor*. It is the United States, and not the citizen, in every such case, that invokes the jurisdiction of that court. The doors of that court are never to be closed against the United States, if it comes to it with a controversy involving "disputed facts or controverted questions of law, and the amount in controversy exceeds three thousand

dollars ; or where the decision will affect a class of cases or furnish a precedent for the future action of any Executive Department, in the adjustment of a class of cases ; or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States." In every such case the United States, is, by this statute, entitled to a judicial trial and determination of the controversy.

There is no limitation of time, as to when any claim of the citizen shall be presented for settlement to an Executive Department. There is no statute which requires such Department to decide any claim of the citizen within a specified time. That Department to which it may have been presented must dispose of and decide it, unless that responsibility can be devolved upon the Court of Claims, by the statute under consideration ; and if it [the claim] is transmitted there by the action of the head of an Executive Department, is it not clear that the same rights which the claimant had in the Executive Departments, are transmitted with the claim to the Court of Claims? The only difference is that, by the act of the United States, the examination and determination of the "claim" becomes *judicial* instead of "*executive*," and it was clearly the intent and purpose of that act to secure the benefit and advantage of such an examination and decision of a claim "*whenever*"—which means at any time—any one of the incidents or contingencies specified in the statute is found to exist.

III It is clear, also, that the intent and purpose of Congress, in enacting the above statute, will be entirely defeated if it shall be declared that the United States cannot secure to itself the advantage of a judicial examination and decision of a claim, whenever it shall desire such examination of caims involving disputed facts or controverted questions of law. The decision made upon a claim may affect a large class of cases, or furnish a pre-

cedent for the action of an Executive Department, and may involve in the consequences of its decision the disbursement of vast sums of money ; or the decision of a claim may involve questions of the highest and most important character. Is it not reasonable to suppose that Congress believed that the decision of claims involving any or either of these questions could be more safely and with greater propriety remitted to the Court of Claims, with the right of an appeal to this Court, rather than leave them for decision to an inexperienced or unlearned clerk of an Executive Department? The United States might, for its own protection, desire a judicial determination of claims involving either of these questions ; but, if the statute under consideration shall receive the narrow construction for which the learned Attorney-General contends, the rights and benefits which it was intended the United States should secure by its passage, will be defeated, because there cannot, in any just sense, be a "*trial* and adjudication" of any case if the United States can defeat such "trial" by interposing a plea of the Statute of Limitations. The absurdity of the proposition becomes apparent by a statement of the pretension in something like the following language : A claim is made upon an Executive Department which affects by its decision a large number of cases, and involves the disbursement of hundreds of thousands of dollars. Its decision, right or wrong, will afford a precedent for the settlement of other like cases. The United States, speaking through its appropriate Executive Department, desires that the controversy which the settlement of the claim involves, shall be transmitted to the Court of Claims for "*trial and adjudication*," so that the questions involved may receive a judicial determination, not only by that court, but also by this Court. The case is transmitted to the Court of Claims, under the authority of this statute. It is there at the instance of the United States, because the claimant can never compel the

transmissal of a cause to that court by the head of an Executive Department, by a writ of mandamus or otherwise. The United States being in court and demanding a judicial trial and determination of the matter in controversy, *for the benefit of the United States*, it is proposed by the head of another Executive Department, also speaking and acting for the United States, to turn the United States out of court by pleading against it, as well as against the claimant, the Statute of Limitations, and by this means defeating the very purpose that the United States sought to accomplish by transmitting the case to the Court of Claims. The statement of a proposition so absurd in its pretensions furnishes its own sufficient and most conclusive answer.

IV. The proposition for which we contend, that the authority given to the head of an Executive Department, by the provisions of this statute, to transmit certain cases to the Court of Claims, was *intended* by Congress for the advantage and benefit of the United States, finds additional force in that provision of the act which restricts the exercise of the authority conferred by it to those cases over which the Court of Claims, by the act for its organization, already had complete jurisdiction. The claimant had no need of such a statute because *he* could institute his suit in the Court of Claims, without any aid from any Executive Department, while the United States was powerless to procure a judicial examination in any case, except under the provisions of this statute. Previous to the enactment of this statute it made no difference if the contention of the citizen in an Executive Department in respect to the adjustment of a claim was important or insignificant, the Department had no option as to its settlement. It could only be settled by the old methods, without any aid from any judicial tribunal. Those methods for determining the truth of a controversy which a judicial "*trial or determination*" always affords with the most

perfect security and the greatest safety, were denied to the United States, until the enactment of this statute. Is it not reasonable to suppose, therefore, that Congress having in mind these important facts *intended*, by the statute we are considering, to afford to the *United States*, equally with the citizen, the right in certain cases to have a judicial determination of the controversy to which it was a party?

V. In the argument of the Attorney General much importance is attached to the word "*cognizable*" as used in the Statute of Limitations, which is interposed as a defense to this action. The language is, "*all claims cognizable by the Court of Claims*," and it is admitted that if this suit had been instituted in that Court *by the appellee*, after the expiration of six years from the time his claim or cause of action first accrued, it would be within the Statute of Limitations, and barred by it. But the suit of the appellee came into the Court of Claims, by the act of the United States, and not by any voluntary action taken or exerted by him. The appellee had a right to presume that, inasmuch as his claim was one that the War Department might legally adjust and settle, that it would, in apt and seasonable time, receive such action as would enable him to protect himself against the running of the statute by the timely institution of his suit in the Court of Claims. He could not foresee that the settlement of his case would affect a class of cases, or furnish a precedent for the action of the War Department, in the adjustment of cases similar to his own. He could not anticipate that the settlement of his case was so important in its consequences as that the *United States*, speaking through the Secretary of War, would require the aid of the Court of Claims and of this Court in its determination. What right had the appellee to assume that the Secretary of War would retain his case for *thirteen* years, and then, having no legal reason for its rejection, should transmit it to the Court of Claims, so that

the United States might defeat his right to recover the amount *admitted to be due to him*, by interposing the plea of the Statute of Limitations? And yet we are gravely told in the argument of the learned Attorney General that there is no *moral* obliquity in such a proceeding. An individual pleading the Statute of Limitations as his only defense to a debt admitted to be due, is everywhere and always denounced as a dishonest trickster. Can the Government afford to be less honest or less just than an individual is required to be? The late Chief Justice Chase thought the obligation to be *honest* was imposed upon the Government as well as upon the citizen, for, in his dissenting opinion in the case of Mason *vs.* The United States (17 Wall., 75), he used the following language: "*I think the United States are not absolved in their dealings with citizens from the obligations of honesty by which individuals are controlled.*" According to the theory of the Attorney General (p. 27 of his argument), an Executive Department may with the utmost propriety retain control of the claim of the citizen until it is barred by the Statute of Limitations, and then, having no other defense against its allowance and payment, may, without the slightest violation of any moral obligation, transmit the claim to the Court of Claims for the express purpose of defeating it by interposing the plea of the Statute of Limitations.

VI. In the argument of the Attorney-General (p. 30), it is also assumed that the plea of the Statute of Limitations to a "*claim*" transmitted to the Court of Claims, by the head of an Executive Department, is an appropriate plea, because the statute under which the transmission of the claim is authorised, declares:

"That all cases so transmitted * * * shall be proceeded in as other cases pending in the Court of Claims, and shall in all respects be subject to the same rules and regulations."

These provisions of the statute have reference only

to the *manner* in which the "*trial and adjudication*" of any cause transmitted to the Court of Claims, shall be obtained *after* that Court has acquired jurisdiction of it. They have no reference to any "*rules or regulations*" which should attempt to prescribe a limitation of time in which claims might be transmitted under the provisions of this act. The authority which the Court of Claims possesses—under the act of Congress for its establishment—to make "rules and regulatious" of practice does not give it the power to enact a statute of limitations, by which the right of the citizen to invoke its jurisdiction shall be limited as to time or in respect to the subject-matter.

These "*rules and regulations*" to which the statute refers are those which the Court of Claims has established for the conduct of its business. A statute of limitations is neither a "*rule*" nor a "*regulation*," nor is it in any just sense a rule of decision. An individual may waive the benefits to which he may be entitled under the Statute of Limitations, but he cannot, by any act of his own, dispense with any "*rule*" or "*regulation*" which a court has established for the purpose of making its proceedings regular, consistent and harmonious. It is clear, therefore, that the defense made by the plea ot the Statute of Limitations, in the case under consideration, derives neither aid nor support from this language of the statute.

Thus it is clear, in every view in which this question presents itself, that the Statute of Limitations, which is the only defense that is seriously interposed here, finds no support in any of the propositions so elaborately discussed in the argument of the Attorney-General. A statute of limitations is always to be strictly construed, and is never by *implication* to be extended to cases not clearly embraced within its provisions. The statute interposed here was intended to be used as a defense to cases which were instituted in the Court of Claims by the voluntary action of the claimant, and it was to be used against *him* as the

penalty resulting from his own *laches* in neglecting to institute his suit in that court within the time prescribed by the statute. It was never intended that it should be extended so as to include causes which the *United States*, acting through the head of an Executive Department, should transmit to that court for "*trial and adjudication*."

The statute upon which the defense is based, became a law on the 3d of March, 1863, and at *that* time the United States had no right to invoke the jurisdiction of the Court of Claims for any purpose, nor to transmit to that Court for "*trial and adjudication*" any case, no matter how important the contention, nor how material to the interests of the United States the result of the controversy might be. If the Statute of Limitations can be successfully pleaded in such a case as this, the effect and result of admitting such a defense, will be the imposition of a *disability* which did not in any respect result from the *laches* of the appellee, for it is conceded that he did in apt and reasonable time [and when his right to institute his suit in the Court of Claims was in no sense impaired] present his claim to that department which had complete jurisdiction and full authority to settle it.

If this plea can be effectual to arrest the "*trial and adjudication*" of such a case as this, then the maxim, *vigilantibus non dormientibus favet lex*, will have been reversed and a defense made effective which resulted from the delay and *laches* of the appellant.

JOHN J. WEED.
THOMAS WILSON.